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THE

ALL INDIA REPORTER

1914

LOWER BURMA SECTION

CONTAINING

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LOWER BURMA CHIEF COURT

1914

Chief Justices :

The Hon'ble Sir Charles Edmund Fox, Kt., Bar-at-Law.

" " Henry Sulivan Hartnoll, Kt., I. C. S., Bar-at-Law, (*Offg.*)

Puisne Judges :

The Hon'ble Sir Henry Sulivan Hartnoll, Kt., I. C. S., Bar-at-Law.

" Mr. E. W. Ormond, B. A., Bar-at-Law.

" " D. H. R. Twomey, I. C. S., Bar-at-Law.

" " S. M. Robinson, Bar-at-Law.

" " L. M. Parlett, I. C. S., (*Addl.*)

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NOMINAL INDEX

A

Abdul Sattar v. Maung Lu Maung 166
Ahmed Gulam Mahomed Sadiq v. Md. Cassim Makda 208
Ahmed Moola Dawood v. Mt. Fatima Bee Bee 261
Ah Yway v. Ma Gyi 31
Annamalay Chetty v. Shaik Mahomed Ismail 152(2)
Arachan v. Maung Po Win 45
Attaides, L.D. v. R.M.K. Chetty 190

B

*Ba Lin v. Emperor 137
*Bally Singh v. Bhugwan Dass Kalwar 62(2)
Bank of Rangoon, Ltd. v. Somasundaram Chetty 248
Ba Nyun v. Emperor 134
British India Steam Navigation Co. Ltd. v. Fakir Mahomed 272
Browne, C. H. v. Emperor 34
Burma Ry. Co. Ltd. v. Hiralal 215

C

Catherine Thaddeus, *In re* 245
Chandi Charan Sen v. Ram Koomar Chakravarti 54
Chas. R. Cowie and Co. v. W. H. A. Skidmore 51
Chet Po, *In re* (FB) 219
Chetty A. T. K. P. L. v. S. K. R. S. S. T. Chetty Firm 151
Chetty V. R. M. V. A. Firm v. Maung Po Sin 180
Chetty V. V. M. Firm v. R.M.A.R. Arunachallum Chetty 207(2)
Chin Ah Yaing, *In re* 247
Chit Maung Maung v. Ma Yait 201
Clifford, G.S. v. Emperor (FB) 65

D

Diekman Brothers & Co. Ltd. v. Sulaiman Hajee Brothers & Co. 200
Dover, E.E. v. E. S. Dover 209
Dunji Deosi v. Pokermall Anandroy 183

E

*Emperor v. A. J. Cooke 23
——— v. Kamali Khan 234
——— v. Kotiya 197
——— v. Ma Thin 259
——— v. Nga Taung Thu 9
——— v. Po Ba 212
——— v. Po Han 145
——— v. Po Thin 156(2)
——— v. Sulaiman 226(1)
Eng Leong & Co. v. B.I.S.N. & Co. Ltd. 146

F

Firm R. M. A. R. v. M. R. M. S. Firm 56

G

Gaggeero Francesco v. L. P. R. Chetty Firm 32

H

Haji Sadulla v. Jawahir Karim Bux 147
Hardandoss v. Mohori Bibi 236
Hla Dun v. M. L. R. M. Chetty Firm 268
Htaung v. Emperor 258

I

Ismail v. Emperor 30

J

Jamal, A. K. A. S. v. Moola Dawood Sons & Co. 273
Jannat Ally, *In the matter of the* Will of Mohamad Ally 270

K

Ko Kyo v. A. K. Curpen Chetty 207(1)
Kya Maung v. V. P. L. V. N. Firm 42
Kya Nyun v. Emperor 216
Kya Nyun v. Emperor 244
Kyaw Yan Maung v. Ma Ngo U 257(2)

L

Lu Maung v. Maung Pu 11

M

*Ma Aung Byu v. Maung Thet Hnin 159
Ma E Me v. Ma E 43
Mahomed Ebrahim Saib v. Maung Ba Gyaw 225
Mahomed Esoof v. Hajee Mahomed Esoof 226(2)
Mahomed Salay Naikwara v. Mulla Goolam Mahomed 169
Ma Kyaing v. Ma Shwe Thin 61
Manackjee Pallanjee v. S. A. Meyappa Chetty 265
Ma Ngwe Yin v. Maung Po Taw 204
Ma Sein Nyun v. Maung U 62 (1)
Ma Tha v. P. L. M. M. Chetty Firm 198
Ma Thein Shin v. Ah Shein 144
Matilda Hindle v. Richard James Hindle 171
Ma Tin Lun v. Ma Dwe 149
Maung Maung v. S. G. Firm 262
Maung Maung v. Wightman & Co. 178(2)
Mi Ah Pu Ma v. Mi Hnin Zi U 44
Muthia Chetty v. Arunachaliam Chetty 37
*Mya Gyi Maung v. Mg. Po Shwe 157
Mya Mg. v. Moosaji Ahmad and Co. 22
Myat Gale v. San Tha 275

N

Nallan Chetty v. Muthusawmy Pillai 57
Nga Ba E v. Emperor 152 (1)
Nga Kya Thin v. Emperor 175
Nga Po Ywet v. Emperor FB 1
Nga Tha Yin v. Emperor 220
Ngwe Ya Maung v. Maung Shwe Ye 277

O

Oodayappa Chetty Firm v. Ramasawmy Chetty 58

P

Padashin v. Maung Lun 189

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LOWER BURMA CHIEF COURT

Absence of Star denotes Cases of Provincial or Small Importance.
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NOMINAL INDEX

A

Abdul Sattar v. Maung Lu Maung 166
Ahmed Gulam Mahomed Sadiq v. Md. Cassim Makda 208
Ahmed Moola Dawood v. Mt. Fatima Bee Bee 261
Ah Yway v. Ma Gyi 31
Annamalay Chetty v. Shaik Mahomed Ismail 152(2)
Arachan v. Maung Po Win 45
Attaides, L.D. v. R.M.K. Chetty 190

B

*Ba Lin v. Emperor 137
*Bally Singh v. Bhugwan Dass Kalwar 62(2)
Bank of Rangoon, Ltd. v. Somasundaram Chetty 248
Ba Nyun v. Emperor 134
British India Steam Navigation Co. Ltd. v. Fakir Mahomed 272
Browne, C. H. v. Emperor 34
Burma Ry. Co. Ltd. v. Hiralal 215

C

Catherine Thaddeus, *In re* 245
Chandi Charan Sen v. Ram Koomar Chakravarti 54
Chas. R. Cowie and Co. v. W. H. A. Skidmore 51
Chet Po, *In re* (FB) 219
Chetty A. T. K. P. L. v. S. K. R. S. S. T. Chetty Firm 151
Chetty V. R. M. V. A. Firm v. Maung Po Sin 180
Chetty V. V. M. Firm v. R.M.A.R. Arunachallum Chetty 207(2)
Chin Ah Yaing, *In re* 247
Chit Maung Maung v. Ma Yait 201
Clifford, G.S. v. Emperor (FB) 65

D

Diekman Brothers & Co. Ltd. v. Sulaiman Hajee Brothers & Co. 200
Dover, E.E. v. E. S. Dover 209
Dunji Deosi v. Pokermall Anandroy 183

E

*Emperor v. A. J. Cooke 23
——— v. Kamali Khan 234
——— v. Kotiya 197
——— v. Ma Thin 259
——— v. Nga Taung Thu 9
——— v. Po Ba 212
——— v. Po Han 145
——— v. Po Thin 156(2)
——— v. Sulaiman 226(1)
Eng Leong & Co. v. B.I.S.N. & Co. Ltd. 146

F

Firm R. M. A. R. v. M. R. M. S. Firm 56

G

Gaggeero Francesco v. L. P. R. Chetty Firm 32

H

Haji Sadulla v. Jawahir Karim Bux 147
Hardandoss v. Mohori Bibi 236
Hla Dun v. M. L. R. M. Chetty Firm 268
Htaung v. Emperor 258

I

Ismail v. Emperor 30

J

Jamal, A. K. A. S. v. Moola Dawood Sons & Co. 273
Jannat Ally, *In the matter of the* Will of Mohamad Ally 270

K

Ko Kyo v. A. K. Curpen Chetty 207(1)
Kya Maung v. V. P. L. V. N. Firm 42
Kya Nyun v. Emperor 216
Kya Nyun v. Emperor 244
Kyaw Yan Maung v. Mi Ngo U 257(2)

L

Lu Maung v. Maung Pu 11

M

*Ma Aung Byu v. Maung Thet Hnin 159
Ma E Me v. Ma E 43
Mahomed Ebrahim Saib v. Maung Ba Gyaw 225
Mahomed Esoof v. Hajee Mahomed Esoof 226(2)
Mahomed Salay Naikwara v. Mulla Goolam Mahomed 169
Ma Kyaing v. Ma Shwe Thin 61
Manackjee Pallanjee v. S. A. Meyappa Chetty 265
Ma Ngwe Yin v. Maung Po Taw 204
Ma Sein Nyun v. Maung U 62 (1)
Ma Tha v. P. L. M. M. Chetty Firm 198
Ma Thein Shin v. Ah Shein 144
Matilda Hindle v. Richard James Hindle 171
Ma Tin Lun v. Ma Dwe 149
Maung Maung v. S. G. Firm 262
Maung Maung v. Wightman & Co. 178(2)
Mi Ah Pu Ma v. Mi Hnin Zi U 44
Muthia Chetty v. Arunachaliam Chetty 37
*Mya Gyi Maung v. Mg. Po Shwe 157
Mya Mg. v. Moosaji Ahmad and Co. 22
Myat Gale v. San Tha 275

N

Nallan Chetty v. Muthusawmy Pillai 57
Nga Ba E v. Emperor 152 (1)
Nga Kya Thin v. Emperor 175
Nga Po Ywet v. Emperor FB 1
Nga Tha Yin v. Emperor 220
Ngwe Ya Maung v. Maung Shwe Ye 277

O

Oodayappa Chetty Firm v. Ramasawmy Chetty 58

P

Padashin v. Maung Lun 189

Palaneappa Chetty v. Arunachellam Chetty 191 (2)
Palaniappa Chetty v. P. M. R. M. Firm 173
Palaniappa Chetty v. Somasundaram Chetty 267
Po Gyi v. Emperor 260
Po Kin v. Maung Kala 271
Po Maung Maung v. Maung Kaing 53
*Po Mya v. Emperor 263
Providence, W. A. v. P. T. Christenson 237
Pu Maung v. Lucy Moss 278
Pwa Me v. San Hla 266

R

Rahima Bi v. Mahomed Saleh 213
Ramanathan Chetty v. Bank of Bengal 46
Ramanathan Pillay v. M. L. V. E. R. M. Firm 257 (1)
Rangoon Electric Tramway and Supply Co. Ltd. v. Rangoon Municipality 161
Rathna Pillay v. N. P. Firm 63
Robertson, A. J. v. Ko Cheik 224

S

Sana Eman Saib v. Mooma Ena Mahomed Meera Saib 168
Saw Lan v. Maung Lun 141
Saw Tu Mg, v. Mi Sa Ma 10
Second Grade Pleader, *In the matter of* 12
Secy. of State v. Mi Dwe 241
Seena M. Haniff & Co. v. Liptons Limited 15
Sein Yin v. Ah Moon Shoke 163 (1)
Shwe Min Maung v. Maung San Nyun 243
Shwe Po Maung v. Maung Bein FB 229
*Sit Yin v. Ma Shin 194
*Sofaer, I. A., *In the matter of* 49
So Mg. v. O. A. R. Ramasawmy Chetty 135 (1)
*Stuart Smith v. Official Liquidator of Bank of Burma 138
Subramonian Chetty v. Vellian Chetty 40
Sweydali v. Esnali 135 (2)

T

Tha Dun Maung v. S. S. Chokalingam Chetty 142
Tha Kado Maung v. Ma Thin Myaing 36
Tha Zan, Mg. v. Mg. Ba Gale 218
Ti Ya v. Emperor FB 128
Toola Ram v. Abdul Gafur 191 (1)
Toon Chan v. P. C. Sen 276
Tuvuriammal v. Santiago 210
Twinzas Oil Co., Ltd. v. Mower & Co., Ltd. 205

U

U Ga Zan v. Hari Pru 156 (1)
U Wisaya v. U Zaw Ta 178 (1)

Y

Yeo Kyew Sum v. U Ke Tu 193
Yin Kye, Mg. v. Ma Sein 233

Z

*Zaw Ta v. Emperor 163 (2)

SUBJECT INDEX

A

Arms Act (11 of 1878)

—S. 19 (a)—Clasp knives are not arms **259**

B

Benami

—Real owner cannot object to disposal of property by benamidar it being consequence of his own fraud - He can set aside transfer only by showing his absence of acquiesence and notice to purchaser **42**

Buddhist Law (Burmese)

—Divorce—Mere caprice is not ground for quarrels—Petty quarrels should not be magnified into cruelty **257 (2)**

— Desertion for statutory periods does not dissolve marriage without volition of either party **233*a***

—Divorce—Obiter—An innocent party can obtain a legal divorce by suit on the ground of desertion for the statutory period alone **233*c***

—Succession—Auratha son gets only fourth share in property jointly acquired by father and mother if not partitioned before father's second marriage **(FB) 229**

— Ecclesiastical — Religious offering becomes irrevocable by mere declaration or delivery—Building built on monastery ground becomes ecclesiastical property **193**

—Texts—Kathanabaing authority recognized in Upper but not in Lower Burma **178 (1)*b***

* —Divorce—Desertion will not be presumed by husband's going to jail—Mere desertion is not sufficient for divorce—Wife well provided during husband's absence in jail marrying another—Her conduct amounts to desertion and adultery **159*a***

—Succession—Separation of children not due to divorce but due to father—Separation does not disentitle children to inherit—Filial neglect must be proved by person alleging to exclude children from inheritance **149**

—Succession—Divorce is prima facie proof of separation of child — Child claiming share must establish that relations were kept up **44*a***

— Succession—Divorce raises presumption that parties' rights are finally settled and this becomes strong when no claim is made for long time **44*b***

—Husband and wife—Dissolution—Separation for six years—Unsuccessful attempt by both to obtain divorce—Husband taking another wife 17 months

Buddhist Law (Burmese)
after separation—Facts held to satisfy conditions of Manugye, S. 17, Ch. 5 **36**
Burma Gambling Act (1 of 1899)
——**S. 3**—Common gaming house explained **258***b*
——**S. 7**—Criminal P. C., S. 103—Ward headmen held to be competent search witnesses. (Per *Young, J.*)—Word "respectable" cannot be construed to mean unconnected with police **(FB) 128**
Burma Municipal Act (3 of 1898)
——**S. 46**—Effect of machinery in valuation of premises explained though machinery itself is not taxable **161**

C

Civil Procedure Code (14 of 1882)
——**S. 20**—Though S. 20 is omitted from new Code very strong reasons must be shown to deprive plaintiff of his right to choose his forum **37**
——**(5 of 1908)**
——**S. 9**—Civil Courts can try ecclesiastical suits **178 (1)***a*
——**S. 11**—For plea of res judicata person must be properly represented **141***b*
——**S. 47 and O. 21, R. 2**—Payment not certified—Suit for declaration that decree is satisfied is barred by S. 47 **267**
——**S. 47 and O. 21, R. 19**—Decree-holder auction-purchaser taking possession but sale set aside—Question of mesne profits must be decided in execution and amount can be set off before subsequent sale **178 (2)***a*
——**S. 66** Real purchaser in possession is not estopped by S. 66 to sue for declaration of title **275**
——**S. 73**—Judgment-debtor must fill in same character in both decrees **191 (1)***a*
——**S. 73**—Some defendants different—Rateable distribution can be allowed only to extent of their interest in both decrees **191 (1)***b*
——**Ss. 92 and 93**—Decision of question of election of trustee under a Court's scheme is appealable **226 (2)***a*
——**Ss. 92 and 93**—Proceedings of election of trustee under S. 539 of the old Code must be summary and inexpensive **226 (2)***b*
——**Ss. 92 and 93**—How scheme framed under S. 539 of the old Code should be construed pointed out—Suit to amend scheme lies **226 (2)***c*
——**S. 92**—Scope of—Suit against trustees under S. 92 compromised—Old trustees discharged without taking accounts and new trustees appointed—Beneficiaries' suit for setting aside decree discharging old trustees on ground of collusion, involving taking of accounts falls under S. 92 and is not tenable without sanction **169**
——**S. 100**—Decree not based on evidence—High Court can interfere **198***a*
——**S. 100**—Mixed question of law and fact cannot be gone into in second appeal unlike Lower Burma Courts Act, S. 30 **166***a*
——**Ss. 100 and 101**—Question of contest between verbal sale and registered sale cannot be raised in second appeal **166***b*
——**S. 104 (1)**—S. 104 (1) does not apply to award not complete in itself and exposes party to further suit **40***a*
——**S. 104 (1) (f) and (2)**—Appellate order reversing refusal to file award is not appealable **61**
——**S. 115**—Interlocutory orders—No interference unless substantial injury is caused—Order refusing to frame issue not interfered with **207 (2)**
——**S. 145**—Surety bond held not in accordance with Court's order—Surety bond held sufficiently complied with for discharge of surety **54**
——**O. 3, R. 2 and O. 6, R. 15**—Agent can sign amended plaint **173***b*
——**O. 6, R. 14**—Plaint for dissolution of partnership cannot be signed by person holding power-of-attorney and carrying on firm's business—Principal must sign—Defect does not defeat decree **191 (2)**
——**O. 6, R. 15**—Court must see that plaints are properly signed and verified **198***b*
——**O. 6, R. 15 and O. 3, R. 2**—Agent can sign amended plaint **173***b*
——**O. 6, R. 17**—Transfer of Property Act (4 of 1882), S. 41—Purchaser of land paying off mortgage over land due from vendor and his father—Knowledge of mortgage by father deprives purchaser of status as bona fide purchaser—Admissions of interest of father in mortgage could be rebutted—Purchaser could not amend suit for possession to one for declaration for charge for money spent **225**
——**O. 17, R. 3**—Court should decide case on materials on record if parties fail to summon witness in time **198***c*

Civil P. C.

——**O. 18, R. 1**—Divorce Act (4 of 1869) Ss. 7 and 45—"Principles and Rules," meaning explained—Restitution of conjugal rights—Suit for—Marriage ceremony admitted —Coercion and non-consent pleaded—Defendant has to begin **210**

——**O. 21, R. 2** and **S. 47**—Payment not certified—Suit for declaration that decree is satisfied is barred by S. 47 **267**

——**O. 21, R. 40**—Arrested judgment-debtor should not be released if decree-holder proves that he is capable of paying but refuses—Burden of proof of inability to pay through poverty is on judgment-debtor **51***a*

——**O. 21, R. 40 (2) (d)**—Words "some part thereof" do not restrict R. 40 to instalment decree only **51***b*

——**O. 21, Rr. 48** and **52**—Prohibitory order on auditor not complied on ground that amount was not at his disposal but of Agent of Railway Company—Amount could be attached subject to Railway Company's lien, and disregard of order held improper—Railway Company held liable for its officer's default—Tort **215**

——**O. 21, R. 66**—Fair and accurate value must be given—Omission sufficient to stay sale **178 (2)***b*

——**O. 21, R. 89**—Sale set aside under R. 89 — Decree-holder is entitled to amount due on date of deposit by purchaser **190**

——**O. 21, R. 91**—R. 91 does not apply where judgment-debtor has interest in portion and not whole—If fraud of decree-holder in concealing judgment-debtor's real interest does not mislead, auction-purchaser cannot succeed. **142**

——**O. 32, R. 15**—Omission to appoint guardian **141***a*

——**O. 34, R. 3**—First mortgagee can sell property in execution irrespective of subsequent claims or litigations **178 (2)***c*

——**O. 40, R. 1**—Partnership—Receiver is usually appointed and the good will and stock-in-trade sold **209**

——**Sch. 2, Para. 18** — Specific Relief Act (1 of 1877), S. 21—Valid award even though not filed is operative and all rights are merged in the award—Rights of parties are to be based only on award —S. 21 is replaced by Sch. 2, Para. 18 **56**

——**Sch. 2, Para. 20**—Award out of Court cannot be remitted **40***b*

Companies Act (6 of 1882)

—— **S. 145**—Duties of auditors—Principal duty of auditors is to protect shareholders and to see that directors and manager are issuing true balance sheets —Shareholders are therefore entitled to rely on auditor as a check on directors **(FB) 65***c*

* ——**S. 214**— In proceedings against auditors under S. 214 irregularity of appointment does not avail when they have so acted **138**

Contract

—— Marriage—Breach of — Damages—Man can sue and get damages for breach of contract of marriage—Plaintiff must prove actual damage— Becoming a butt of acquaintances' jest or feeling shame is no injury **204**

——Teji mandi—Teji mandi contracts are unilateral and reciprocal — Formality of teji mandi contract stated—Teji mandi contracts are not wagering contracts unless genuine delivery of goods was never intended **183**

——Construction—Hire and purchase—Nature of, explained — Hirer becomes owner when amount is paid — It is not sale within Contract Act, S. 78 **157***a*

Contract Act (9 of 1872)

——**S. 2**—Quoting lowest price is not making offer — What is offer and acceptance explained **236**

—— **S. 16** — No presumption of undue influence in India or England exists in case of gift to children **278**

—— **S. 16**—Contract for repayment of what is due—No advantage taken—Plea of undue influence cannot stand—Proof of use of dominating influence is required **22**

—— **S. 19**—Suit by purchaser to recover price of house from broker and attesting witness identifying vendor before registration officer on ground of fraud and misrepresentation — Claim decreed against both but finding of Court stated that identifier did not know that representation was false—Finding held to be defective **147**

—— **S. 26**— Agreement to repay large sum if boy marries second wife comes under S. 26 as it might prevent second marriage—S. 26 is not confined to restraint of first marriage only **156 (1)**

—— **S. 78** — Contract—Construction—Hire and purchase—Nature of, explained —Hirer becomes owner when amount is

Contract Act
paid—It is not sale within Contract Act, S. 78 **157***a*
—— **S. 90, Illus. (e)**—Handing over of delivery order is not in itself sufficient to give possession **151***a*
—— **S. 90, Illus. (e)**—Constructive delivery must have effect of putting goods in buyer's possession **151***b*
—— **S. 107**—S. 107 is not mandatory—Seller can postpone resale though notice given—If any benefit is obtained by postponement credit must be given to buyer **273**
—— **Ss. 171, 217 and 221**—Amount deposited in excess, through mistake in decree by barrister under profit—Excess amount attached—Barrister cannot have equitable lien as it was not fruits of any order obtained—No lien under Ss. 171, 217 and 221—As no reference to fees was made while depositing, deposit held could not be regarded under protest **224**
—— **Ss. 172 and 173**—Bona fide incumbrancer without notice and in possession is preferred to prior encumbrancer—Burden of proof of notice is on person alleging **265**
—— **S. 188**—Agent unless so authorized cannot make his master surety or borrow in his name for another or trust partner or sign promissory note jointly with others **46***a*
—— **S. 188**—Chetty banking—Standing guarantee for others not Chetties is not necessary incident of Chetty banking **46***b*
—— **S. 188**—Powers-of-attorney must be strictly construed — Onus of proving extra powers is on person alleging powers-of attorney **46***c*
—— **S. 216**—Managing agents held not entitled to make profits out of goods supplied **205**
Court-fees Act (7 of 1870)
—— **S. 19 (8) and Art. 11**—"Amount or value" in Art. 11 refers to net value—Net value not exceeding Rs. 1,000 — No fees are payable on probate **247***a*
—— **Art. 11**—Word "value" means net value **245***a*
Criminal Procedure Code (5 of 1898)
—— **S. 103**—Search list added to after being signed by witnesses—Search is not invalidated **258***a*
—— **S. 103**—Ward-headmen held to be competent search witnesses—(Per *Young J.*)—Word "respectable" cannot be construed to mean unconnected with police—Burma Gambling Act (1899), S. 7 **(FB) 128**
—— **Ss. 133 and 138**—Bona fide claim of private property must be decided by Magistrate and cannot be left to jury—Question must be raised before jury is appointed—Jury's verdict does not bar civil suit to establish private right (*obiter*) **31**
—— **S. 146 (b)**—Refusal to hand over property attached under S. 146 (b) to successful party in civil Court on ground of appeal by other party is ultra vires—Chief Court can set aside order under Criminal P. C., S 435 (3) **218**
—— **Ss. 195, 439 and 537**—In revision on conviction of offence not requiring sanction, conviction cannot be changed to one under offence requiring it **30***c*
—— **Ss. 215 and 494**—Commitment can be quashed on question of law only—Absence of territorial jurisdiction is question of law but failure of justice must be involved—Doubtful evidence is no ground to quash commitment—Proper order in such case is one under S. 494 **9**
—— **S. 227**—Penal Code, S. 420—Directors of bank charged with cheating by inducing deposits by false balance-sheet and false directors' report — Charge amended by adding words regarding subsequent conduct of bank — Amendment held not bad in law **(FB) 65***a*
* —— **Ss. 234 and 239**—S. 234 requires that the several acts must form part of one transaction—Misjoinder is ground to set aside conviction—Prejudice to appellant is not necessary **263**
—— **S. 290**—Omission to direct jury to consider intention in trials of offences under Ss. 302, 304 and 326, I. P. C.—Charge is defective **216***a*
—— **S. 297**—Summing up of Judge must be read as a whole **(FB) 65***b*
—— **S. 297**—When ingredients of offence not explained summing up to jury is wrong and verdict cannot stand **34**
—— **Ss. 303 and 307**—Majority verdict unambiguous—Questions cannot be asked—Court must proceed under S. 307 **244**
—— **S. 307**—Opinions of Judge and jury and entire evidence can be considered **197***a*
—— **S. 383**—It is illegal to sentence an accused person to suffer imprisonment in a police lock-up **156 (2)***a*

Criminal P. C.

—— **Ss. 423** and **438**—Appellate Court must dispose of appeal under S. 423 and cannot refer question of law under S. 438 **226 (1)**

—— **Ss. 435 (3)** and **146 (b)** — Refusal to hand over property attached under S. 146 (b) to successful party, in civil Court on ground of appeal by other party is ultra vires Chief Court can set aside order under Criminal P. C., S. 435 (3) **218**

—— **S. 435 (4)** — Revision application presented to Sessions Judge—Action by District Magistrate suo motu during pendency of application is not valid **260**

—— **Ss. 439, 195** and **537**—In revision on conviction of offence not requiring sanction, conviction cannot be changed to one under offence requiring it **30***c*

—— **S. 488** - Marriage must be proved to get order of maintenance **266**

* —— **S. 488** - Limit of sentence that can be passed on default stated—Where more than one month's allowance remains unpaid even after warrant imprisonment exceeding one month cannot be awarded **163 (2)**

—— **Ss. 494** and **215**—Commitment can be quashed on question of law only — Absence of territorial jurisdiction is question of law but failure of justice must be involved—Doubtful evidence is no ground to quash commitment—Proper order in such case is one under S. 494 **9**

—— **S. 517**- Order under S. 517 passed to refund amount fraudulently obtained by accused **220***c*

—— **Ss. 537, 439** and **195**—In revision on conviction of offence not requiring sanction, conviction cannot be changed to one under offence requiring it 30*c*

—— **S. 545 (a)** and **(b)**—Compensation for expenses can be awarded under Cl. (a), but not under Cl. (b), where it is not realizable in civil Court **220***b*

Custom

—— Karens—Marriage — Nat-worshipping Karens are governed by custom—If parties are Buddhists that law applies **10**

D

Divorce Act (4 of 1869)

—— **Ss. 7** and **45** — "Principles and Rules," meaning explained—Restitution of conjugal rights—Suit for—Marriage ceremony admitted—Coercion and non-consent pleaded — Defendant has to begin—Civil P.C. (1908), O. 18, R. 1 **210**

E

Evidence

—— Note recorded by clerk in arbitration is inadmissible **159***b*

Evidence Act (1 of 1872)

—— **S. 21**—Confession by accused to thugyi or headman on inducement is inadmissible — What is inducement stated **175**

* —— **S. 91**—Promissory note—No separate cause of action than insufficiently stamped note Defendant though admitting execution plaintiff cannot succeed **62 (2)**

—— **Ss. 102** and **103** - Joint executants must prove knowledge of payee that he signed as surety, to escape liability **248***c*

—— **S. 102**—Simple mortgage—Subsequent usufructuary mortgage to former's brother—Sale by latter to his brother—No mutation of names obtained—Onus of prcof of sale lies heavily on usufructuary mortgagee **243**

—— **S. 102** Onus of proving that transaction tock place after Transfer of Property Act is on person alleging it **53***b*

—— **S. 114**—Official acts are presumed to be regularly done **23***c*

—— **S. 115** - There is great difference between acquiescence in act in progress and after completion — Acquiescence after execution of deed creates no estoppel **63***b*

Executor

— Appointment — Making elder son trustee if testator dies during minority of other minor son is not sufficient to justify that he is appointed executor **270**

H

Hackney Carriage Act (14 of 1879)

—— **Ss. 6** and **7**—Driver is not "keeper" within R. 15 of Insein Rules under the Act—When owner can be punished under R. 15 pointed out **234**

Husband and Wife

——Divorce—Beating wife and charging with adultery is sufficient cruelty **233***b*

—— Divorce - Adultery is sufficient not to grant divorce but separation—Single assault when provoked is not cruelty—Assault though condoned would however amount to cruelty when accompanied by adultery — Venereal disease not contracted from wife is proof of adultery **171**

Husband and Wife
——Marriage—Cohabiting together and considering themselves partners in life does not create rights and liabilities of marriage **63***a*

I

Interpretation of Statutes
——Meaning not clear—Benefit of doubt must be given to subject **247***b*
——Meaning not clear—Interpretation should be in favour of subject **245***b*
——Reasons and objects—They may be considered—Clauses must be construed as whole and in reference to others **15***c*

L

Landlord and Tenant
—— Covenant for renewal is not included in stipulation for renewal "on same covenants"—Covenant for perpetual renewal must be strictly proved **241***a*
——Rent suit—Decree against lessee—No decree against sublessee can be passed for same rent **45**
Legal Practitioners Act (18 of 1879)
—— Concealment of conviction is misconduct **12**
Limitation Act (9 of 1908)
——Standing tree would be deemed to be immovable property **241***b*
—— **Art 68**—Probate and Administration Act (5 of 1881), S. 78—Suit against surety in administration bond for breach is governed by Art. 68 **261**
—— **Arts. 89** and **90**—Suit against agent for misconduct—Limitation begins when misconduct of agent is disclosed after getting possession of accounts **173***a*
—— **Arts. 113, 131** and **144**—Art. 144 applies to claims on title and not on contract—Agreement for renewal of lease is not interest in immovable property and suit for specific performance is governed by Art. 113 and not Art. 144 **241***c*
Lower Burma Chief Court Insolvency Rules,
—— **R. 83**—R. 83 is ultra vires **49***b*
Lower Burma Courts Act (6 of 1900)
—— **S. 30**—Civil P. C. (1908), S. 100—Mixed question of law and fact cannot be gone into in second appeal unlike Lower Burma Courts Act, S. 30 **166***a*
Lower Burma Land and Revenue Act (2 of 1876)
—— **Ss. 55** and **56**—Claim to ownership of crops is distinguished from claim to use and occupation of land—Civil Court has jurisdiction to decide objection to attachment of crops—Incidental inquiry nto possession of land for determining ownership of crop does not oust civil Court's jurisdiction **268**
Lower Burma Town and Village Lands Act (4 of 1898)
—— **Ss. 15** and **41**—Civil suit is not barred between persons for right over Government land **57**
* —— **S. 41**—S 41 does not bar civil Court's jurisdiction in suits for lands not held under grant or lease or license from Government and which is at its disposal — Suit where Government's rights are not to be decided can be entertained in civil Court **194***a*

M

Mahomedan Law
—— Marriage—Consent—Shafi girl married to Hanafi against father's disapproval and misrepresenting her to be converted—Marriage held invalid—Who is "siyeeba" explained **213**
——Gift Divesting of ownership and possession is necessary—Gift in future is void—Registration cannot effect validity —Invalid gift is revocable **208**
—— Gift Mahomedan law applies to settlements by Sunni Mahomedan—Life estate being inconsistent, donee takes absolute estate **152 (2)**
Malicious Prosecution
—— Ingredients to be proved stated **189***a*
—— Plaintiff's conviction in first Court is fatal to suit for damages **189***b*
Master and Servant
—— Misconduct is good cause for dismissal **271**
Merchandise Marks Act (4 of 1889)
—— **Ss. 6 & 7**—Scope—The word "he" in Ss. 6 and 7 includes "she" and "it" **15***b*

P

Paper Currency Act (2 of 1910)
— **S. 26**—S. 26 does not extend to endorsement **168**
S. 26—Agreement to return deposit on production of receipt for deposit—Whether receipt could be engagement within S. 26 is doubtful **32**
Partnership
—— Heir of deceased partner need not be party to suit to recover debts due to firm — Heir cannot himself sue — He can apply for dissolution and accounts and get receiver appointed for realizing debts **58**
Penal Code (45 of 1860)
— **Ss. 24** and **420** — Person by obtaining lottery prize by false representa-

Penal Code
tion does not cause wrongful loss to real winner but acts dishonestly within meaning of S. 24 **220***a*
—— **Ss. 34, 326** and **302** — Out of three injuries by several accused one was slight, other dangerous, and third fatal — Accused stated he hit with cane— Common object held could not be presumed to be more than causing grievous hurt **152(1)**
—— **Ss. 40** and **41**—Ss. 40 and 41 contemplate such laws as create fresh offences **145***b*
——**Ss. 71** and **420** — Three separate acceptances of deposits from three persons at different times are not parts of one composite offence **(FB) 65***d*
——**Ss. 182, 199, 177** and **193**— False report to revenue officer for getting name entered is punishable under S. 182 only **30***b*
—— **S. 188**—Land granted to *A*—*B* building on that land— Disobedience by *B* of order promulgated by Deputy Commissioner—*B* is not guility under S. 188 **134**
—— **S. 193** — Pleadings wilfully false amount to offence **272**
——**S. 199**—Declaration referred to in S. 199 must be one receivable in evidence of facts declared **30***a*
*—— **S. 294-A** —Club used for social purpose and also for gaming — Member of executive committee will be deemed to have "kept" a gaming house — Use need not be exclusively for gaming **23***a*
——**Ss. 294-A** and **34**—Where common object is to keep gaming house all members are individually guilty **23***b*
——**S. 294-A**—Collector is not authorized to sanction lottery — Mere taking of income-tax from club on profits from lotteries is no authorization **23***d*
*—— **S. 294-A** — Words "not authorized" explained—Burden of proving authority is on accused **23***e*
——**S. 294-A** — "Proposal" in S. 294-A explained **23***f*
——**Ss. 299, 300** and **304**— Knowledge of probability of death when struck with sharp weapon on vital part should be presumed—But offence of murder cannot be held in every case **197***b*
——**Ss. 299, 300** and **304**—Question of knowledge does not arise when death is caused by direct injury—It is to be considered only to determine intention and not to determine if case falls under S. 304 **197***c*
——**Ss. 302, 304** and **326**— Jury must consider accused's frame of mind and nature of weapon used—Intention should be ascertained from acts — Eyewitnesses should be examined in detail **216***b*
—— **Ss. 302, 34** and **326**— Out of three injuries by several accused one was slight, other dangerous and third fatal— Accused stated he hit with cane — Common object held could not be presumed to be more than causing grievous hurt **152(1)**
——**S. 405**— Agreement construed and money held not entrusted within S. 405 —(Per *Twomey, J.*): Person, if made liable for loans in any event he cannot be said to be agent — (Per *Ormond, J.*): Trust or no trust depends upon actual facts—If transaction is loan any conditions or agreement would not change it —Agreement cannot make Penal Code applicable to loan—If principal does not undertake any risk he creates no trust— (Per *Parlett, J.*): If company does not undertake to bear loss in any event it implies that they are not owners (Per *Robinson, J.*): Agreement is held to evidence loan—(Per *Hartnoll, Offg. J. C., dissenting*): Contract to bear loss by an agent does not affect transaction which is trust **(FB) 1**
* —— **S. 408**—Hirer selling article before paying in full commits criminal breach of trust **157***b*
——**S. 420**—Directors of bank charged with cheating by inducing deposits by false balance sheet and false director's report — Charge amended by adding words regarding subsequent conduct of bank—Amendment held not bad in law —Criminal P. C., S. 227 **(FB) 65***a*
—— **Ss. 482** and **486**— Corporate body can be punished for offence under S. 482 or S. 486—Word "whoever" applies to bodies also **15***a*
—— **Ss. 482** and **486** - Burden of innocence is on accused when prima facie case is made out **15***d*
——**Ss. 482** and **486** —" Whoever " in Ss. 482 and 486 explained **15***e*

Power-of-attorney
——If authority under, is questioned it must be shown that it arises out of the power only—Construction must be strict —(Per *Twomey, J.*): Power to sign ac-

Power-of-Attorney
commodation notes may be inferred from power to sign promissory notes **248***a*
Presidency Towns Insolvency Act (3 of 1909)
*——**Ss. 17 and 99**—Under S. 99 (1) firm can be adjudged insolvent—Order operates against each partner **49***a*
Prisons Act (9 of 1894)
——**S. 3 (1)**—Words "prison" and "jail" explained **156 (2)***b*
Probate and Administration Act (5 of 1881)
——**Ss. 41** and **23** - Letters of administration should be granted to mother and daughter in preference to eldest son when she is trustee and other beneficiaries desire it **201***b*
——**Ss. 69** and **90 (4)**—Scope of S. 90 stated—Creditor has no interest unless he has charge under S. 69—Creditor has no locus standi to oppose probate unless on ground of fraud **43**
——**S. 78** Suit against surety in administration bond for breach is governed by Limitation Act (9 of 1908), Art. 68 **261**
Promissory Note
——Liability—When two Chetty firms sign joint and several promissory notes, they are both jointly interested in the moneys borrowed **248***b*
*—— No separate cause of action than insufficiently stamped note—Defendant though admitting execution, plaintiff cannot succeed—Evidence Act 1 of 1872, S. 91 **62 (2)**
Provincial Insolvency Act (3 of 1907)
——**S. 46**—Appeal from order dismissing petition for fraud and abuse of process of law is incompetent without leave of District Court or High Court **257 (1)**

R

Railways Act (9 of 1890)
*——**S. 101**—Actual endangering must be proved—Dispatch of train without receiving "line clear"—No accident occurred — Station master held not guilty **137**

S

Shipping
—— Bill of lading—Goods must be delivered on proof of ownership—In spite of instruction from consignee if goods delivered to person holding bill of lading company is liable—Loss of bill of lading must be proved to be bona fide **146**
Specific Relief Act (1 of 1877)
——**S. 9**—S. 9 (2) does not bar regular suit on title in addition to or instead of suit under S. 9—Regular suit cannot change nature of suit **11***a*
——**S. 9** - Plaintiff's possession as mortgagee contested and decided—Mortgage found not redeemed—Suit held not under S. 9 and appeal lies **11***b*
——**S. 21**—Valid award even though not filed is operative and all rights are merged in the award—Rights of parties are to be based only on award—S. 21 is replaced by Civil P. C. (5 of 1908), Sch. 2, para. 18 **56**
Stamp Act (2 of 1899)
——**S. 2 (12)**—"Execution"—Unsigned document is not liable to stamp duty **219**
Succession Act (10 of 1865)
—— **Ss. 331** and **332**—Act does not apply to one professing to be Hindu though of mixed parentage **201***a*
——**S. 331**—Act does not apply to Chinese—Buddhist law applies—Forms of Chinese marriage are relaxed in case of poor **144**

T

Tort
—— Negligence—Animals— Damages for injury caused by a domestic animal—Knowledge on the part of the owner as to its ferocious nature—Burden of proof is on plaintiff **277**
—— Libel—Absence of intention is no defence—If article libellous and is understood to refer to plaintiff it is sufficient **237***a*
——Defamation— Damages — Evidence of rumours is inadmissible in assessing damages **237***b*
——Civil P. C. (1908), O. 21, Rr. 48 and 52—Prohibitory order on auditor not complied on ground that amount was not at his disposal but of Agent of Railway Company—Amount could be attached subject to Railway Company's lien and disregard of order held improper—Railway Company held liable for its officer's default **215**
Transfer of Property Act (4 of 1882)
—— **S. 2 (e)**—Valid equitable mortgage made before Act was applied could be assigned **207 (1)**
——**Ss. 3** and **130**—Benefit of contract but not burden can be assigned **200**
——**S. 41**—Purchaser of land paying off mortgage over land due from vendor and his father—Knowledge of mortgage by father deprives purchaser of status as

Transfer of Property Act
bona fide purchaser — Admissions of interest of father in mortgage could be rebutted—Purchaser could not amend suit of possession to one for declaration for charge for money spent—Civil P. C., O. 6, R. 17 **225**
—— **S. 41**—Applicability—S. 41 does not apply where the neighbour who knew about the infirmity of the transferor's title omits to make necessary inquiry **141***c*
—— **S. 50**—Advance payment of rent is condition precedent to letting premises—Receiver's claim for rent paid in advance to owner cannot stand **276**
—— **S. 53** — Land granted to debtor transferred with grantor's permission as required by grant—Nonsolvency of transferor—Absence of consideration — Presumption under S. 53 arises—Payment by volunteer to save attachment Only personal cause of action against debtor arises **262**
—— **S. 53**—Suit under S. 53 must be as representing other creditors—Objection on this ground must be raised in first Court **180***a*
—— **S. 53**—Intention to defraud must be general and not against one creditor alone **180***b*
—— **S. 53**—Undue preference to one creditor though not bona fide is not sufficient to set side transfer—Difference between creditor and stranger purchaser in respect of proof pointed out **180***c*
—— **S. 53**—Relationship only raises suspicion but is no proof of aiding fraudulent transfer **180***d*
—— **S. 53**—Suit for possession of land transferred by plaintiff fraudulently benami—Burden of proof that fraud was not carried out is on plaintiff **135 (2)**
—— **S. 54**—Agreement to sell subsequently carried out is loosely spoken as sale **166***c*
—— **S. 55**—Unregistered sale for over Rs 100 after Act made applicable is invalid—But purchaser in possession can have charge on property for purchase money and interest **53***a*
—— **S. 59** Attesting witnesses must witness actually execution—Attestation by one witness and scribe is not sufficient **135 (1)**
* — **S. 108 (b)** — Encroachment by lessee enures to benefit of lessor—Though Act not applicable principle is **194***b*
—— **S. 123** - S. 123 does not apply to private partition of joint family property **62 (1)**

W

Whipping Act (6 of 1864)
—— **S. 5**—Magistrate's finding as to age is final—Sentence of whipping carried out—No other sentence can be inflicted **212**
——**(4 of 1909)**
——Act provides punishment for offences already punishable under Penal Code **145***c*
—— Act must be construed in favour of subject **145***d*
—— **S. 3**—Abetment of theft or of offence mentioned under S. 3 by persons not juveniles—Whipping cannot be given **145***a*

Workmens Breach of Contract Act (13 of 1859)
——**S. 1**—S. 1 governs artificer who does not personally work but agrees to get work done under his supervision **163 (1)**

COMPARATIVE TABLES

TABLE No. I

Showing seriatim the pages of LOWER BURMA RULINGS for the year 1914 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of 7 LOWER BURMA RULINGS.

Col. No. 2 denotes corresponding references of the ALL INDIA REPORTER.

7 Lower Burma Rulings (1914 only)=All India Reporter.

LBR)	A. I. R.			LBR)	A. I. R.			LBR)	A. I. R.			LBR)	A. I. R.			LBR)	A. I. R.		
140	1914	*LB*	244	262	1914	*LB*	53	277	1914	*LB*	61	306	1914	*LB*	15	347	1914	*LB*	210
143	"	"	65	264	"	"	271	278	"	"	1	319	"	"	23	351	"	"	163
251	"	"	226	266	"	"	270	293	"	"	43	333	"	"	169	356	"	"	245
252	"	"	273	268	"	"	276	294	"	"	268	336	"	"	265	359	"	"	247
257*a*	"	"	257	270	"	"	266	298	"	"	157	339	"	"	51	362	"	"	201
257*b*	"	"	272	272	"	"	263	301	"	"	63	343	"	"	236	367	"	"	267
260	"	"	275	275	"	"	258	304	"	"	156								

TABLE No. II

Showing seriatim the pages of other REPORTS, JOURNALS and PERIODICALS for the year 1914 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of others JOURNALS.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

7 Burma Law Times=All India Reporter

Bur.LT)	A. I. R.			Bur.LT)	A. I. R.			Bur.LT)	A. I. R.			Bur.LT)	A. I. R.			Bur.LT)	A. I. R.		
1	1914	*LB*	37	54	1914	*LB*	183	98	1914	*LB*	15	197	1914	*LB*	36	2 1	1914	*LB*	58
5	"	"	54	63	"	"	193	99	"	"	145	199	"	"	173	263	"	"	32
8	"	"	42	64	"	"	178	101	"	"	137	202	"	"	191	268	"	"	241
10	"	"	11	67	"	"	191	105	"	*PC*	97	205	"	*UB*	11	272	"	"	245
12	"	"	135	68	"	"	190	116	"	*LB*	15	206	"	"	27	275	"	"	247
14	"	"	204	69	"	"	225	126	"	"	46	209	"	*LB*	1	277	"	*UB*	15
16	"	"	257	71	"	*UB*	30	129	"	"	210	222	"	"	157	279	"	"	53
18	"	"	142	73	"	"	18	133	"	"	201	225	"	"	163	282	"	"	19
20	"	"	34	75	"	*LB*	152	136	"	"	236	230	"	"	138	287	"	*LB*	40
23	"	"	31	80	"	"	149	139	"	"	276	238	"	"	215	290	"	"	197
25	"	"	134	83	"	"	44	140	"	"	207	240	"	"	159	292	"	"	212
26	"	"	9	85	"	"	45	142	"	"	208	242	"	"	51	993	"	"	218
27	"	*UB*	6	86	"	"	53	143	"	"	128	245	"	"	43	294	"	"	171
34	"	"	1	88	"	"	63	155	"	"	237	246	"	"	144	298	"	"	226
37	*Too old*			90	"	"	22	160	"	"	169	249	"	*UB*	43	301	"	"	234
40	"	"		92	"	"	146	163	"	"	258	250	"	"	49	304*a*	"	"	12
44	1914	*LB*	161	93	"	"	151	165	"	"	259	253	"	"	34	304*b*	"	"	49
48	"	"	219	95	"	"	62	167	"	*PC*	116	255	"	"	44	308	"	"	56
51	"	"	200	96	"	"	168	187	"	*LB*	23	257	"	*LB*	180	310	"	"	198
53	"	"	257																

15 Cr. L. J. & 22 to 25 Indian Cases=All India Reporter.

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1914 Lahore.**

TABLE No. III

Showing seriatim the pages of ALL INDIA REPORTER, 1914 LOWER BURMA with corresponding references of other REPORTS, JOURNALS and PERIODICALS.

N. B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1914 LOWER BURMA.

Col. No. 2 denotes corresponding references of other REPORTS and JOURNALS.

A. I. R. 1914 Lower Burma=Other Journals.

A.I.R.)	Other Journals			A.I.R.)	Other Journals			A.I.R.)	Other Journals			A.I.R.)	Other Journals			A.I.R.)	Other Journals		
1 FB	7	*L B R*	278	11	7	*L B R*	88	23	7	*Bur L T*	187	34	7	*Bur L T*	20				
	24	*I C*	332	12	7	*Bur L T*	304		23	*I C*	195		23	*I C*	465				
	7	*Bur L T*	209		25	*I C*	339		15	*Cr L J*	243		15	*Cr L J*	257				
	15	*Cr L J*	452		15	*Cr L J*	587	30	8	*Bur L T*	82	36	7	*Bur L T*	197				
9	7	*Bur L T*	26	15	7	*L B R*	306		25	*I C*	515		25	*I C*	95				
	23	*I C*	478		23	*I C*	689		15	*Cr L J*	603	37	7	*Bur L T*	1				
	15	*Cr L J*	270		7	*Bur L T*	116	31	7	*Bur L T*	23		23	*I C*	345				
10	15	*Cr L J*	590		15	*Cr L J*	337		23	*I C*	467		7	*L B R*	129				
	25	*I C*	342	22	7	*Bur L T*	90		15	*Cr L J*	259	40	8	*L B R*	68				
11	7	*Bur L T*	10		24	*I C.*	67	32	7	*Bur L T*	266		7	*Bur L T*	287				
	23	*I C*	367	23	7	*L B R*	319		24	*I C*	201		24	*I C*	132				

A. I. R. 1914 Lower Burma=Other Journals—(*Concld*)

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
42	7	*Bur L T*	8	146	24	*I C*	70	194	8	*L B R*	71	237	24	*I C*	749
	23	*I C.*	363	147	22	*I C*	818		29	*I C*	872	241	8	*L B R*	64
43	7	*Bur L T*	245	149	7	*Bur L T*	80	197	7	*Bur L T*	290		24	*I C*	911
	25	*I C*	48		23	*I C*	915		24	*I C*	601		7	*Bur L T*	268
	7	*L B R*	293	151	7	*Bur L T*	93		15	*Cr L J*	513	243	22	*I C*	806
44	7	*Bur L T*	83		22	*I C*	952	198	7	*Bur L T*	310	244	7	*L B R*	140
	23	*I C*	948	152 (1)	15	*Cr L J*	484		26	*I C*	240		25	*I C*	1006
45	7	*Bur L T*	85		24	*I C*	572	200	7	*Bur L T*	51		15	*Cr L J*	678
	24	*I C*	51	152 (2)	7	*L B R*	123		22	*I C*	940	245	7	*L B R*	356
46	7	*Bur L T*	126		23	*I C*	903		7	*L B R*	9[illegible]		24	*I C*	793
	23	*I C*	516		7	*Bur L T*	75	201	7	*L B R*	362		7	*Bur L T*	272
49	7	*Bur L T*	304	156 (1)	7	*L B R*	304		24	*I C*	638	247	7	*L B R*	359
	25	*I C*	222		24	*I C*	777		7	*Bur L T*	133		24	*I C*	823
51	7	*L B R*	339		7	*Bur L T*	98	204	7	*Bur L T*	14		7	*Bur L T*	275
	23	*I C*	833	156 (2)	7	*L B R*	62		23	*I C*	376	248	8	*L B R*	168
	7	*Bur L T*	242		22	*I C*	154	205	8	*L B R*	102		26	*I C*	253
53	7	*L B R*	262		15	*Cr L J*	10		26	*I C*	205		8	*Bur L T*	1
	24	*I C*	57	157	7	*L B R*	298	207 (1)	7	*Bur L T*	140	257 (1)	7	*Bur L T*	53
	7	*Bur L T*	86		24	*I C*	161		24	*I C*	700		24	*I C*	438
54	7	*Bur L T*	5		7	*Bur L T*	222	207 (2)	8	*L B R*	77		7	*L B R*	257
	23	*I C*	349		15	*Cr L J*	425		29	*I C*	876	257 (2)	7	*Bur L T*	16
56	7	*Bur L T*	308	159	7	*Bur L T*	240	208	7	*Bur L T*	142		23	*I C*	380
	25	*I C*	220		23	*I C*	940		24	*I C*	704	258	7	*L B R*	275
57	23	*I C*	[illegible]61		8	*L B R*	50	209	8	*L B R*	332		24	*I C*	835
58	7	*Bur L T*	261		29	*I C*	863		29	*I C*	684		7	*Bur L T*	163
	24	*I C*	268	161	7	*L B R*	119		8	*Bur L T*	57		15	*Cr L J*	523
	8	*L B R*	130		24	*I C*	395	210	7	*L B R*	347	259	7	*Bur L T*	165
61	8	*Bur L T*	44		7	*Bur L T*	44		23	*I C*	242		25	*I C*	337
	25	*I C*	7	163 (1)	7	*L B R*	82		7	*Bur L T*	129		15	*Cr L J*	585
	7	*L B R*	277		23	*I C*	187	112	8	*L B R*	143	260	8	*L B R*	361
62 (1)	25	*I C*	498		15	*Cr L J*	235		24	*I C*	946		36	*I C*	465
62 (2)	7	*L B R*	101	163 (2)	7	*L B R*	351		7	*Bur L T*	292		10	*Bur L T*	172
	23	*I C*	975		24	*I C*	170		15	*Cr L J*	538		17	*Cr L J*	497
	7	*Bur L T*	95		7	*Bur L T*	225	213	8	*L B R*	54	261	8	*L B R*	99
63	7	*L B R*	301		15	*Cr L J*	434		29	*I C*	866		26	*I C*	505
	24	*I C*	60	166	22	*I C*	802	215	8	*L B R*	62		8	*Bur L T*	59
	7	*Bur L T*	88	168	7	*L B R*	70		24	*I C*	725	262	8	*L B R*	233
65**FB**	7	*L B R*	143		22	*I C*	77		7	*Bur L T*	238		35	*I C*	448
	22	*I C*	432		7	*Bur L T*	96	216	8	*L B R*	125		10	*Bur L T*	67
	6	*Bur L T*	20	169	7	*L B R*	333		33	*I C*	634	263	7	*L B R*	272
	15	*Cr L J*	80		23	*I C*	111		17	*Cr L J*	154		26	*I C*	636
128**FB**	7	*Bur L T*	143		7	*Bur L T*	160	218	7	*Bur L T*	293		16	*Cr L J*	44
	24	*I C*	321	171	7	*Bur L T*	294		24	*I C*	588	265	7	*L B R*	336
	8	*L B R*	38		24	*I C*	710		15	*Cr L J*	500		28	*I C*	462
	15	*Cr L J*	441	173	7	*Bur L T*	199	219**FB**	7	*L B R*	77	266	7	*L B R*	270
134	7	*L B R*	75		25	*I C*	136		22	*I C*	75		26	*I C*	266
	22	*I C*	166	175	8	*L B R*	94		7	*Bur L T*	48		16	*Cr L J*	39
	7	*Bur L T*	25		26	*I C*	129	220	15	*Cr L J*	555	267	7	*L B R*	367
	15	*Cr L J*	22		8	*Bur L T*	39		24	*I C*	963		28	*I C*	468
135 (1)	24	*I C*	375		15	*Cr L J*	681	224	8	*L B R*	70	268	7	*L B R*	294
135 (2)	7	*Bur L T*	12	178 (1)	8	*L B R*	145		29	*I C*	870		26	*I C*	684
	23	*I C*	370		27	*I C*	112	225	24	*I C*	482	270	7	*L B R*	266
137	7	*L B R*	72		8	*Bur L T*	62		7	*Bur L T*	69		25	*I C*	820
	22	*I C*	161	178 (2)	7	*Bur L T*	64	226 (1)	7	*L B R*	251	271	7	*L B R*	264
	7	*Bur L T*	101		24	*I C*	468		25	*I C*	995		25	*I C*	815
	15	*Cr L J*	17	180	7	*Bur L T*	257		15	*Cr L J*	667	272	7	*L B R*	257
138	7	*Bur L T*	230		23	*I C*	341	226 (2)	7	*Bur L T*	298		25	*I C*	805
	24	*I C*	431	183	7	*Bur L T*	54		24	*I C*	915	273	7	*L B R*	252
	8	*L B R*	80		24	*I C*	441	229**FB**	8	*L B R*	115		25	*I C*	799
141	22	*I C*	673	189	8	*L B R*	78		27	*I C*	632	275	7	*L B R*	260
142	7	*Bur L T*	18		29	*I C*	883		8	*Bur L T*	25		25	*I C*	275
	23	*I C*	383		8	*Bur L T*	69	233	22	*I C*	945	276	7	*L B R*	268
144	8	*L B R*	222	190	7	*Bur L T*	68	234	8	*L B R*	91		24	*I C*	693
	24	*I C*	367		24	*I C*	479		24	*I C*	960		7	*Bur L T*	139
	7	*Bur L T*	246	191 (1)	7	*Bur L T*	67		7	*Bur L T*	301	277	4	*Bur L T*	138
145	7	*L B R*	63		24	*I C*	476		15	*Cr L J*	552		12	*I C*	910
	22	*I C*	147	191 (2)	7	*Bur L T*	202	236	7	*L B R*	343		8	*L B R*	388
	7	*Bur L T*	99		25	*I C*	140		23	*I C*	322	278	8	*L B R*	235
	15	*Cr L J*	3	193	7	*Bur L T*	63		7	*Bur L T*	136		26	*I C*	39
146	7	*Bur L T*	92		24	*I C*	465	237	7	*Bur L T*	155		8	*Bur L T*	75

THE
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1914
LOWER BURMA CHIEF COURT

A. I. R. 1914 Lower Burma 1
Full Bench

HARTNOLL, OFFG. C. J., ORMOND, TWOMEY, ROBINSON AND PARLETT, JJ.

Nga Po Ywet—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Ref. No. 91 of 1913, Decided on 6th April 1914, from order of Dist. Magistrate, Rangoon., D/- 7th October 1913.

Penal Code (45 of 1860), S. 405—Agreement construed and money held not entrusted within S. 405—(Per *Twomey, J.*): **Person, if made liable for loans in any event he cannot be said to be agent**—(Per *Ormond, J.*): **Trust or no trust depends upon actual facts—If transaction is loan any conditions or agreement would not change it—Agreement cannot make Penal Code applicable to loan—If principal does not undertake any risk he creates no trust**—(Per *Parlett, J.*): **If company does not undertake to bear loss in any event it implies that they are not owners.**—(Per *Robinson J.*): **Agreement is held to evidence loan.**—(Per *Hartnoll, Offg. J. C. dissenting*): **Contract to bear loss by an agent does not affect transaction which is trust.**

In pursuance of the following contract a company advanced Rs. 4,500 to the petitioner who acted as the company's broker

"Whereas the broker . . . . . has requested the company to entrust him with advances of money . . . . . and . . . . . acknowledges that he will receive all such advances . . . . . and hold the same in trust for the company . . it is . . . . . agreed that:

(1) the broker is not the agent of the company;

(2) the broker shall employ the money of the company in and about the purchase and transport of paddy to the company's mill . . . .

(3) the property in the money and paddy purchased therewith shall be and remain in the company;

(4) the broker shall . . . . upon arrival of the paddy . . . . tender the same to the company;

(5) the company shall take delivery of the paddy and , , , , , either pay or credit the broker with price of the same at the current market rate;

(6) . . . . . .

(7) The broker shall be responsible for the payment of the money or the supply of paddy to the value thereof if either the money or the paddy shall be lost by any means, including the act of God, thieves, or other causes over which the broker has no control, the broker shall indemnify the company against all loss:

Held: (*by the majority, Hartnoll, Offg. C. J.* dissenting) that the money was not "entrusted" to the broker within the meaning of S. 405, I. P. C. [P 4 C 2]

Per *Twomey, J.*—A man cannot commit criminal misappropriation of his own property.

The terms of Cls. (5) and (7) of the agreement are incompatible with the view that the broker was employed as an agent at all. An agent would be required to exercise reasonable diligence, but would not be responsible, as he is made responsible in this agreement, for loss in any event. [P 4 C 2]

(Per *Ormond, J.*)—The question whether *A* entrusted property to *B* is one which depends upon the actual facts of the case and not merely upon the legal terms employed by the parties. If the real nature of the transaction is a loan, the fact that the parties in writing call it a trust, or agree that for the purposes of the Penal Code the property in the money shall be deemed to remain in the original owner or agree that the party receiving the money shall be liable for criminal breach of trust if he applies the money to a purpose other than that agreed upon, would not bring the transaction within the scope of S. 405, I. P. C. The Penal Code cannot be altered by agreement of parties so as to make S. 405 applicable to a transaction which is in its real nature a loan. If *A* receives money from *B* for certain specified purposes, the money is not entrusted to *A* within the meaning of S. 405, I. P. C., if *A* is liable to return the money in any event. Therefore the trust, if any, in this case is merely a technical or colourable trust. [P 5 C 2]

(Per *Parlett, J.*)—The fact that the company can under no circumstances bear the loss of the money implies that they are not the owners of it. [P 7 C 2]

(Per *Robinson, J.*)—The agreement merely shows that the company employs the services of the broker and gives him an advance, but it declines to make him its servant or agent. This being so the ownership in the money is transferred to

the broker and no entrustment is created, that is to say, the agreement in question evidences a loan accompanied by a promise to use the money in a particular way. [P 9 C 1]

(Per *Hartnoll, Offg. C. J.*)—Irrespective of whether a man is an agent or not he may be a trustee.

The agreement evidences more than a loan with a condition attached and more than an advance with an undertaking to use it in the purchase of paddy. The money was advanced for a specified purpose and in consequence of confidence reposed in the broker by the company. The mere fact that the broker has contracted to bear any loss that may be incurred does not make him the less a trustee. [P 6 C 2]

Order of Reference

Nga Po Ywet has been convicted of criminal breach of trust in respect of Rs. 4,500 advanced to him by Joseph Heap & Sons for the purpose of purchasing paddy for them.

At the hearing of the appeal it was urged that the payment of the money to him was not proved. It appears that for some time prior to 12th March 1913 accused has been supplying paddy to the firm as sub-broker under their broker Maung Manng. The procedure was for the accused to bring consignments of paddy to the mill and receive from the firm the price of the same either direct or through Maung Maung and then, after deducting the commission of Maung Maung and himself, to pay the sellers of the paddy what was due to him. Such paddy is described as "outside paddy." The transactions in it appear to have been all cash transactions. On 12th March 1913 he entered into the agreement which gave rise to the present case. Under it he was to apply sums supplied to him by the firm in the purchase of paddy, tender the same to the firm who were to pay for or credit him with the price of the same. The firm's manager gave evidence that on 12th March Rs. 4,000 was handed to the accused under the agreement, and a further Rs. 500 on 14th March. He was corroborated by a broker Maung Po Hlaing (P. W. 6). Accused's own witness, Hla Baw, also said that he saw the money paid. Accused himself admitted receipt of it, but afterwards said that the amount represented what he at the time owed to the firm and Hla Baw subsequently tried to make out the same. Apart, however from the absence of any attempt to prove that he was then indebted to the firm in that sum and of any explanation of why, if he were so indebted, he did not give one acknowledgment for the whole amount, instead of two on different dates, in view of the evidence, I have no doubt that he did receive the sums of Rs. 4,000 and Rs. 500 in cash on 12th and 14th March respectively. It appears further that on 12th April accused brought two boat-loads of paddy to the mill and the firm believing that that paddy was purchased with the money advanced in the previous month cancelled the two acknowledgments for these sums. It was in reality "outside paddy" and on 15th April accused came with a man named Po Ethe, real seller of the paddy, and the price of Rs. 3,728 was paid in cash, two new receipts being taken from accused for Rs, 3,000 and Rs. 1,500. It is not clear why credit for Rs. 4,500 wae given on 12th April for a consignment valued three days later at only Rs. 3,728 nor why, on the 15th two separate receipts were taken. It is however admitted that such was the case and that no paddy has been purchased with or supplied against the Rs. 4,500, and that the accused is liable civilly for the money. He states that the amount has been set against heavy losses which he alleges he sustained in his dealings with the firm prior to 12th March 1913, and that at the time he was prosecuted he was unable to supply paddy for this Rs. 4,500, on account of the Rangoon price being so much lower than that in the districts but that if market conditions improved later on he might be able to do so. If the Rupees 4,500 was a trust fund then the accused was not entitled to use it to recoup himself for losses of his own money. The real defence is that the money was not held by him in trust, but lent to him. This depends upon the legal effect of the agreement of 12th March which runs as follows:

PADDY BROKER'S AGREEMENT.

Agreement made the 12*th day of March* 1913.

Between Joseph Heap and Sons Limited hereinafter called "The Company" of the one part and Maung Hpo Ywet hereinafter called "The Broker" of the other part.

Whereas the broker has represented to the company that he can purchase for their benefit paddy in the districts and has requested the company to entrust him with advances of money to be made at the discretion of the company

in order that he may make such purchases and whereas the broker hereby acknowledges that he will receive all such advances as the company shall make to him and hold the same in trust for the company now it is hereby agreed:

1. The broker is not the agent of the company and shall not be at liberty to bind them in any manner whatsoever.

2. The broker shall employ the moneys of the company in and about the purchase and transport of paddy to the company's mill at Dawbong.

3. The property in the money and paddy purchased therewith shall be and remain in the company.

4. The broker shall immediately upon arrival of the paddy in Rangoon tender the same to the company at their said mill.

5. The company shall take delivery of the paddy and at their option either pay or credit the broker with the price of the same at the current market rate. * * * *

The broker agrees to accept payment for the paddy at the said current market rate whether the same shall be higher or lower than the rate at which he purchased the paddy.

6. The company shall pay to the broker either in cash or by crediting his account with the amount thereof brokerage at the following rates: * * *

7. The broker shall be responsible for the payment of the money or the supply of paddy to the value thereof to the company and it is hereby expressly agreed that if either the money or the paddy shall be lost by any means, including the act of God, thieves, or other causes over which the broker has no control, the broker shall indemnify the company against all loss.

8. This agreement shall govern all advances hereafter to be made by the company to the broker, so that if the company shall hereafter make further advances to the broker such further advances shall be subject to this agreement and the trusts hereof and it is hereby also agreed that if the broker shall at any time obtain paddy with money advanced hereunder and receive the price thereof from the company in cash he will set apart out of such price a sum equivalent to the amount of outstandings so used and treat the same as a further advance holding it on the same trusts as the original advance.

It is argued for accused that the terms Cls. 5 and 7 of the agreement are contradictory of its other terms and are incompatible with accused being a trustee. No doubt if the effect of the agreement as a whole is not to create a trust and is to transfer the property in the money advanced to the accused, then the mere statements in the document that there is trust and that the property did not pass to accused, cannot alter its effect. In *Hock Cheng & Co.* v. *Tha Ka Do* (1) the agreement specified a time within which the paddy was to be supplied and the approximate quantity to be supplied: in other respects the agreement appears to have been essentially the same as that in the present case except that here words are added that the money is held in trust and remains the property of the company. The question whether this addition alters the effect of the agreement is one of importance and I therefore refer for the decision of a Bench the question whether the moneys advanced to the accused in pursuance of the agreement of 12th March 1913 set out above, were entrusted to him within the meaning of S. 405, I. P. C.

Pending the decision of the appeal, accused may be released on bail in Rs. 5,000 with two sureties.

Opinions

Twomey, J.—It seems to me that if a trust arises at all in such cases as this, it can only arise from the relation of the parties to one another as principal and agent. This view is supported by the statement of the learned counsel for the prosecution (at the hearing of the reference) that though the "broker" is declared in Cl. 1 of the agreement under consideration not to be the agent of the company, he should nevertheless be regarded as their agent for the limited purpose of buying paddy. But it is difficult to understand how we can regard the "broker" as an agent at the moment of expending the money, and not as an agent previously when he received and held the money and subsequently when he has the paddy in his possession before delivering it to the company.

If the money was advanced to the accused as agent of the company the company would retain the beneficial owner-

(1) [1913] 7 L. B. R. 16=19 I. C. 145=14 Cr. L. J. 145.

ship thereof and a case of trust would necessarily arise; and conversely, if the beneficial ownership is shown to have remained in the company then the accused must be regarded as an agent and as having held the money in trust. The agreement contains express declarations that the money is received in trust and that the property in the money and the paddy purchased therewith shall be and remain in the company. But these declarations do not conclude the matter. They cannot have effect if the contract contains other terms which are plainly inconsistent with a continuance of the company's ownership. To begin with I would point to the word "tender" in C. 4 which seems to imply that the paddy is the property of the broker till it is made over to the company; the word "tender" would not be appropriate to the case of a man buying paddy as agent of another. This, however is a small point and might be regarded as a mere slip in drafting the agreement. It would not be enough by itself to show that the paddy was not already the property of the milling company. Not so however as regards Cls. 5 and 7 which are, in my opinion, altogether inconsistent with the contention of the company. Cl. 5 provides that they are to pay for the paddy at the rate prevailing at Rangoon on the day the broker delivered it to them and not the rate at which the broker bought the paddy.

Under Cl. 7 if the money or paddy is lost from any cause whatever the broker is to bear the loss. These conditions nullify the effect of the declaration that the property in the money and paddy is to be and remain in the company. They are consistent only with the interpretation that the beneficial ownership in the money passed to the broker at the time of the advance and that the property in the paddy is with him till he delivers it to the company. Notwithstanding the express declarations referred to, it is the duty of the Court to examine all the terms of the transaction with the strictness required in a criminal matter and to determine whether it is really a case of "entrusting" money to an agent in the sense of the Penal Code. If it is found that the other terms are inconsistent with such an interpretation or even if there is any reasonable doubt about it the Court is bound to decide that the money was not "entrusted" within the meaning of S. 405, I. P. C., and that the property in the money did in fact pass to the broker. If the property passed, there could be no "criminal breach of trust", for this offence always involves "criminal misappropriation" and a man cannot commit criminal misappropriation of his own property.

The terms of Cls. 5 and 7 are incompatible with the view that the broker was employed as an agent at all. An agent would be required to exercise reasonable diligence but would not be responsible, as he is made responsible in this agreement, for loss in any event. Any paddy that an agent buys would be held by him entirely subject to the directions and control of the principal from the time of purchase, whereas this agreement does not bind the "broker" as to his dealings with the paddy except that he shall "tender it to the company." He can choose his own time for delivery, can hold up the paddy he has bought and take advantage of a rise in the market before delivering it to the company. Moreover, if the market rises he is not bound to deliver all the paddy he has bought, but only the equivalent at the increased market rate of the amount of the advances received from the company. On the other hand, if the market falls he has to make good the difference out of his own pocket. These incidents are at variance with the notion of agency.

The accused in this case was not subjected to the direction and control of the company. He agreed to buy paddy for them, but the manner and means of performance were left to his discretion except so far as they are specified in the agreement. In these circumstances he must, in my opinion, be regarded as an independent contractor and not as an agent. The company cannot have it both ways, that is to say, they cannot retain dominion over the money until the broker expends it, and at the same time enjoy immunity from the ordinary risks and liabilities incidental to the ownership of the money and of the paddy bought with it. The maxim *qui sentit commodum entire debet et onus* applies to the case, not because the agreement contains an express declara-

tion that the broker is not the agent of the company, but because it further provides that the money and paddy are to be held entirely at the broker's risk and seeing that the broker is left to conduct his paddy-buying business at his own discretion unfettered by the control and direction of the company, I would decide that the broker cannot be regarded as the agent of the company and that therefore he was not "entrusted" with the money qua agent. Nor in my opinion is there any reason to hold that he was "entrusted" with the money otherwise.

On these grounds I would answer the reference in the negative.

Ormond, J.—It has been decided by a Full Bench of this Court that breach of trust cannot be committed in respect of money taken on loan, because the property in the money passes to the borrower. If *A* takes money from *B* on loan or otherwise, upon a false representation of fact, he is guilty of cheating. The representation of fact may be that it is *A*'s intention to buy paddy with the money and sell it to *B*. If *A*, at the time of taking the money, had that intention but subsequently abandoned that intention and spent the money in some other way, he would not be guilty of cheating; and he would not be guilty of criminal breach of trust unless the property in the money remained in *B*. In this case the dealer took the money from the company for the puropose of using it in his business in buying paddy and selling to the company, in order that he might make as much profit as possible for himself. The company could not, at will, recover the money from the buyer. because he has the right to retain it in order to use it in the above manner. And they could not recover the paddy bought by the dealer, because they are entitled to receive only so much paddy at their mill in Rangoon, the value of which at the current rate at the time of "tender" by the dealer, would be equivalent to the amount advanced to the dealer. And any loss of money or paddy falls on the dealer. Thus although there is a term in the contract that the property in the money and paddy purchased therewith shall be and remain in the company, the usual incidents attaching to property so far as the company is concerned are altogether absent.

The agreement, no doubt, says that the dealer shall "indemnify" the company against all loss, thereby implying that the loss of the "trust" property in the first place falls upon the company and that the dealer insures the company against loss. But this is merely an indirect way of saying that the dealer holds the money, and the paddy until delivered at the mill, at his own risk. As pointed out by Parlett, J., in his reference, this agreement is, in its effect, the same as the agreement which was considered by the Full Bench in *Hock Cheng & Co.* v. *Tha Ka Do* (1). The question whether *A* entrusted property to *B* is one which depends upon the actual facts of the case, and not merely upon the legal terms employed by the parties. If the real nature of the transaction is a loan, the fact that the parties in writing call it a trust or agree that for the purposes of the Indian Penal Code the property in the money shall be deemed to remain in the original owner, or agree that the party receiving the money shall be liable for criminal breach of trust if he applies the money to a purpose other than that agreed upon, would not bring the transaction within the scope of S. 405, I. P. C. The Penal Code cannot be altered by agreement of parties so as to make S. 405 applicable to a transaction which is in its real nature a loan. If *A* receives money from *B* for certain specified purposes, I do not think the money is "entrusted" to *A* within the meaning of S. 405, I. P. C., if *A* is to be liable for the money, to give in any event. In my opinion the trust (if any), in this case is merely a technical or colourable trust. I would answer the question referred in the negative.

Hartnoll, Offg. C. J.—Mg. Po Ywet was advanced by Joseph Heap & Sons Rs. 4,500, Rs. 4,000 on the receipt Ex. D, dated 12th March 1913, and Rs. 500 on the promissory note Ex. E, dated 14th March 1913 to purchase paddy for them. These sums were advanced in pursuance of an agreement he signed on 12th March 1913, and which is Ex. A. Subsequently by mistake Exs. D and E were cancelled but they were replaced by the receipts, Exs. B and C, dated 15th April 1913, for Rs. 3,000 and Rs. 1,500, respectively. The order of reference gives the facts in detail and it is unnecessary

to repeat them. The point referred to us for decision is whether the moneys advanced to Maung Po Ywet in pursuance of the agreement of 13th March 1913 were entrusted to him within the meaning of S. 405, I. P. C. The case is as equal to the cases of *Nga Po Seik* v. *Emperor* (2) and *Hock Cheng & Co.* v. *Tha Ka Do* (1). A new form of agreement has been entered into between the miller and the man who is advanced money for the purchase and supply of paddy — in this instance Mg. Po Ywet — and it is urged that in accordance with the terms of it there is an entrustment of the money within the meaning of S. 405, I. P. C. The essentials of the agreement between the two parties are practically the same as in the previous cases except that in the present agreement the company binds itself to take delivery of the paddy purchased. The man taking the advance is to be credited for the paddy he supplies according to the rate current on the day of supply; if he has paid for the paddy at a higher rate he is to bear the loss, but if at a lower rate he is to enjoy the profit. Also, if the money or paddy is lost by the act of God, thieves, or other causes over which he has no control, he is to bear such loss. But the agreement expressly declares that the person to whom the advances are made and who is called the broker holds the sale in trust, that the property in the money and paddy purchased therewith shall be and remain in the company, and that the broker shall immediately upon arrival of the paddy in Rangoon tender the same to the company and that the company shall take delivery of it and at their option either pay for or credit the broker with its price at the current market rate.

The reasons on which my decision was based in the former case apply generally to the present case. But in this case an express trust is declared. It is stipulated that the property in the money and paddy purchased therewith remain in the company and the company bind themselves to take delivery of the paddy. The same arguments arise that such terms of the agreement are inconsistent with those relating to profit and loss. It is urged that as Po Ywet has to bear all loss as set out in para. 7 in the agreement and also loss caused by a fall in market price between the time of his purchase and the time the company takes over the paddy, he cannot be said to hold the advances and paddy purchased with such in trust, that the mere fact that a trust is declared by the agreement cannot create a trust, the other conditions of the agreement being as they are. It seems to me that the present agreement evidences more than a loan with a condition attached and more than an advance with an undertaking to use it in the purchase of paddy, that there is an entrustment within the meaning of S. 405, I. P. C. The money was advanced for a specified purpose and in consequence of confidence reposed in Mg. Po Ywet by the company. He has expressly agreed to hold the moneys in trust for the purchase of paddy and for no other purpose. It is expressly agreed that the property in the money and paddy purchased therewith is to remain in the company. The mere facts, that, if the money or paddy is stolen or lost otherwise, and if the market value falls between the time of the purchase and the time of supply to the company, the broker is to bear the loss, do not seem to me to remove the arrangement between the parties from one of entrustment. The equitable interest in the property remains in the company and the broker has agreed to apply the money or paddy purchased with it for the use and benefit of the company. The facts that he has contracted to bear any loss that may be incurred in the manner he has, does not seem to me to make him the less a trustee.

It was stated that para. 1 of the agreement is inconsistent with the rest of it and this would appear to be so as the broker would be the agent of the company for the purchase of paddy with the money advanced to him for the purpose; but even if it is so inconsistent I do not see that it affects the matter. Irrespective of whether a man is an agent or not, he may be a trustee. I would answer the question referred by saying that in my opinion, the moneys advanced to Po Ywet in pursuance of the agreement of 12th March 1913 set out in the order of reference were entrusted to him within the meaning of S. 405, I. P. C.

(2) [1912] 6 L. B. R. 62=17 I. C. 824=13 Cr. L. J. 888.

Parlett, J.—The legal aspect of the agreement has been so fully dealt with in the foregoing judgments that I do not think that I can usefully add anything to what has been said, but it is interesting to trace how matters would work out according to the strict terms of the agreement in a simple concrete case.

Supposing there was only one advance to Po Ywet of Rs. 1,000 and that he found he could buy paddy in the district at such a rate that delivered at the mill it would cost him at Rs. 90 per hundred baskets, and that is extended to the whole Rs. 1,000 in his purchase and transport; he would thus have approximately 1,111 baskets to be delivered. If the market rate in Rangoon on the date of delivery was Rs. 100 per hundred baskets, the value of the paddy would be Rs. 1,111. By para. 5 of the agreement the company have expressly reserved to themselves the option of paying for or crediting the broker with the price of the paddy tendered. They could therefore insist upon forcing Rs. 1,111 upon Po Ywet and compelling him under para. 8 to hold Rs. 1,000 of it on trust for them; the agreement giving him no power to terminate the trust, he would be driven to a suit if he wished to do so; meanwhile he would be responsible for the whole amount though he deposited it in a bank and that bank failed. Nay, if he so deposited it at interest he might be prosecuted criminally for using the money otherwise than in and about the purchase and transport of paddy to the company's mill. On the other hand the company might, if they wished, merely credit him with Rs. 1,111 wiping out the Rs. 1,000 advanced and showing a balance in his favour of Rs. 111 but paying him nothing. A credit entry in his favour in the books of Joseph Heap & Sons would be of title use to Po Ywet for the purpose of meeting his current expenses. Only if the company deigned to credit his account with Rs. 1,000 and to close it and pay him Rs. 111 in cash, could the trust be terminated and could Po Ywet get any real profit out of the transaction at all. This shows how one-sided the agreement is and how completely designed merely to protect the company from loss under all circumstances and in any event. Again suppose in the case suggested above Po Ywet spent Rs. 900 of the Rs. 1,000 in buying and delivering 1,000 baskets of paddy, the Rangoon price on the date of delivery being Rs. 100 per 100 baskets, and that the company credited him with Rs. 1,000. According to the agreement the Rs. 100 left Po Ywet's hands always and would still remain the property of the company, and they would be under no obligation to transfer it to him. On the contrary he would be bound to expend it in the purchase and transport of paddy, and if he used it otherwise would be liable to be prosecuted.

But would any criminal Court be found to convict if he put it in his pocket as his representating his profit over the transaction? Surely not. Once however it is conceded that if the market conditions sufficiently favoured him Po Ywet was not bound to expend on paddy the whole of the amount advanced to him, it is clear that his position is merely that of a trader operating on his own account, and the fiction that the property in the money remains in the company and that he is a trustee in respect of it is at once exploded. It cannot be again said that a trustee may be remunerated for the services which he performs, but no case has been quoted in which the remuneration even remotely resembles that purporting to be offered in this case; and what does it amount to? Merely the chance of making a profit in the ordinary course of trading with, it is true, the additional advantage of an assured market for the goods up to a limited quantity at the price prevailing on the date of delivery. I consider that this cannot be called remuneration for carrying out duties as a trustee. Po Ywet takes merely the ordinary risks of profit or loss incidental to trading incurred by a man operating on his own account, who has secured a contract to place a certain quantity of his goods at certain prices. Whether he makes a profit or a loss the agreement provides that the company shall incur no loss in any event. The fact that they can under no circumstances bear the loss of the money implies, I think that they are not the owners of it.

I would answer the question referred in the negative.

Robinson, J.—The only apparent change in the facts of this case from those covered by the Full Bench decision

in *Hock Cheng and Co.* v. *Tha Ka Do* (1) is that there is a declaration in the agreement executed that a trust is created and a statement that the property in the money advanced and the paddy purchased therewith remains in the company. Mere allegations of this kind cannot in themselves create a trust nor create ownership in the money after it has been handed over and in this as in every criminal case it is necessary to weigh all the facts and circumstances and then decide on them as a whole. For the purposes of a criminal charge under S. 405, I. P. C., there must be an entrustment of the property or of dominion over property followed by a dishonest misappropriation or conversion, or by a disuser or disposal of the property in violation of a legal contract made touching the discharge of such trust.

The entrustment may be "in any manner," but if this money when handed over became the property of the appellant or if it ceased to be the property of the company there can have been no entrustment.

What then are the facts? I take it to be incontestable that the agreement in this case has been deliberately drafted so as to endeavour to create such a state of facts as will allow of a criminal charge if the money is not expended in purchasing paddy and supplying it to the company. The difficulty experienced in arriving at such a result is due to the care necessary to avoid rendering the company liable to third parties owing to the acts of the person receiving the advance. If such a person becomes merely the agent of the company the latter may be liable to outside clauses. Hence we find that Cl. 1 declares the "broker" shall not be at liberty to bind the company in any manner and that he is not the agent of the company. If not the agent I fail to see in what capacity he could act while the property in the money still remained in the company, and I understood during the argument that it was urged that he was not the agent in one sense but was in another.

In fact counsel was in a dilemma out of which he could not extricate himself satisfactorily. The agreement provides he is to employ the money only in the purchase of paddy and its transport to the company's mill. He is to tender it to the company immediately on its arrival in Rangoon and the company undertakes to take it over at the market rate current on the day of delivery and the broker to accept that rate. The broker is to get brokerage. The "broker" is to take in addition all profits arising from this arrangement and is also to bear also all loss including the loss arising from the act of God, etc., over which he has no control. The agreement states the "broker" is not the agent of the company. If that is so in my opinion the company fails in its endeavour to make him criminally liable. But that statement will be of no avail if the result of all the terms and considerations is to create the legal status of principal and agent.

If the company is to remain owner of the money it must be liable for losses arising from a proper expenditure of the money in terms of the agreement and it would be entitled to the profits. Under the agreement the "broker" must act in all the contracts made for the acquisition of paddy as a principal and all the incidents of the contracts fall on him. He approaches the company and says: "I can get you the paddy you want and I will do so if you help me by lending me money." The company agrees provided he will use this money for this purpose only, but expressly stipulates that it undertakes no liabilities and will not claim any profits. If the ownership in the money remains in the company then the ownership in any paddy acquired vests in the company; it is merely the money converted into another form. But this is expressly provided against by the provision that the company is not to be liable to third parties or for loss by the act of God, etc. In my opinion the agreement merely shows that the company, being desirous of getting paddy, employs the services of the "broker" and gives him an advance, but it declines to make the broker its servant or agent. This being so, the ownarship in the money is transferred to the broker and no entrustment is created.

Let us suppose the "broker" duly expends the money in strict accordance with the terms of the agreement but the paddy is then lost by the act of God or owing to thieves through no fault of the "broker". The company claims

in one clause that the ownership in the paddy lies in it and not in the broker. Yet in another that the broker must bear the loss and he is to be still liable for the advance. Can the company be heard to say he is not their agent for the purchase, but that the paddy when bought belongs to it, and yet again when it is lost it belonged to the "broker"?

In my opinion this agreement evidences a loan accompanied by a promise to use the money in a particular way, for the ownership in the money and the paddy bought with it must on a consideration of all the terms of the agreement be held to have vested in the "broker".

I would, therefore, answer the reference in the negative.

K.N./R.K. *Reference answered.*

A. I. R. 1914 Lower Burma 9

TWOMEY, J.

Emperor

v.

Nga Taung Thu and *others*—Accused.

Criminal Revn. No. 141-B of 1913, Decided on 29th May 1913, from order of 1st Class Township Magistrate, Ramree, D/- 8th May 1913.

Criminal P. C. (5 of 1898), Ss. 215, 494 and 537—Commitment can be quashed on question of law only—Absence of territorial jurisdiction is question of law but failure of justice must be involved—Doubtful evidence is no ground to quash commitment—Proper order in such case is one under S. 494.

A commitment order can be quashed under S. 215 only on a point of law. The want of territorial jurisdiction in the Magistrate who holds the inquiry is a point of law. But the commitment is valid in spite of the want of territorial jurisdiction unless a failure of justice has in fact been caused by such commitment. A commitment order cannot be quashed merely on the ground that the evidence was doubtful. The proper course would be for the District Magistrate in such case to instruct the Public Prosecutor to withdraw under S. 494. [P 9 C 2]

Order.—The three accused have been committed to the Sessions on a charge of murder. The order of commitment was passed by the 1st class Magistrate, Ramree. The case did not occur within the limits of his territorial jurisdiction. He held the inquiry because an order was passed transferring the case from the Cheduba Magistrate to the Ramree Magistrate. But this order of transfer was passed by the Subdivisional Magistrate, Kyaukpyu, who had no power to pass it. The Subdivisional Magistrate purported to sign the order "for the District Makistrate", the District Magistrate being on tour at the time. But this device, would not overcome the difficulty. It was only the District Magistrate who could pass the order and the officer who was carrying on the District Magistrate's current duties was not vested with the District Magistrate's powers under the Criminal Procedure Code.

A commitment order can be quashed under S. 215, Criminal P. C., only on a point of law. The want of territorial jurisdiction in the 1st class Magistrate who held the inquiry is a point of law. But the commitment is valid in spite of the want of territorial jurisdiction unless a failure of justice has in fact been caused by such commitment: see S. 537, Criminal P. .C. If a failure of justice did occur in this case it is clear that it was not due to the fact that the committing Magistrate had no territorial jurisdiction to inquire into the case. The commitment order cannot be quashed on this ground.

The District Magistrate recommends that it should be quashed on the ground that the commitment should not have been made and that there should be further investigation. He forwards a note by the Police Superintendent pointing out that the evidence is insufficient and untrustworthy. There is certain direct evidence that the accused beat the deceased, but the committing Magistrate disbelieved this evidence. Apart from this evidence he thought that there was nothing but suspicion and he remarked that the accused should get the benefit of the doubt. Nevertheless he proceeded to commit the three accused men for trial.

I should be glad to quash the commitment order in the circumstances. But I find myself unable to do so as no question of law is involved. A commitment order cannot be quashed merely on the ground that the evidence is doubtful.

It is open to the District Magistrate, if he thinks fit, to instruct the Public Prosecutor to withdraw under S. 494, Criminal P. C.

The records are returned.

K.N./R.K. *Order accordingly.*

S. N. DAR, B. A. LL. B.,
Vakil High Court

A. I. R. 1914 Lower Burma 10

HARTNOLL, J.

Mg. Saw Tu—Petitioner.

v.

Ma Sa Ma—Respondent.

Criminal Revn. No. 143-B of 1914, Decided on 3rd August 1914, from order of First Class Subdivisional Magistrate, Nyaunglebin, D/- 7th April 1914.

Custom—Karens—Marriage—Nat-worshipping karens are governed by custom—If parties are Budhists that law applies.

The Nat-worshipping Karens have peculiar marriage ceremonies of their own. A match-maker brings the parties together; the man goes to the woman's house if the parties were not married before; but the woman may go to the man's house if he is a widower. A cock and hen eating would apparently complete the ceremony but if the parties profess Buddhism, though Karens, they may marry according to Buddhist law. [P 11 C 1]

Halkar—for Petitioner.

Judgment.—Ma Sa Ma applied for an order under S. 488, Criminal P. C., against one Ko Saw Tu on the ground that she was his wife but he had turned her out and deserted her. Ko Saw Tu denied that she was his wife. The parties are Karens and described themselves as professing the Buddhist religion. The Magistrate who heard the application found that there had been a marriage between the parties and directed that Saw Tu pay Rs. 5 a month to Ma Sa Ma. Saw Tu being dissatisfied with the order then applied to the Sessions Judge Toungoo, to revise it. The Sessions Judge has submitted the proceedings to this Court with the recommendation that the Magistrate's order be set aside on the ground that it is very doubtful whether any marriage was celebrated between the parties. In the application for revision it was assumed that the parties were Nat-worshippers. The Nat-worshipping Karens have apparently peculiar marriage ceremonies of their own. The Sessions Judge in his order has assumed that any marriage between the parties must be according to these peculiar customs; but inasmuch as the parties professed themselves to be Budhists, the question is whether the marriage ceremony to be observed in their case should not be according to the Budhist Law.

One Nan Saw Mo, who is Saw Tu's sister-in-law, went to her brother Mg. Shwe Ke's house where Ma Sa Ma was living. She told her brother that Saw Tu wanted to marry Ma Sa Ma. Ma Sa Ma is a sister-in-law to Mg. Shwe Ke. Shwe Ke consulted Ma Sa Ma's uncle, Mg. Tha Du, and he was agreeable to the marriage. The 7th waxing of Nayon was fixed for the date, and on that day Ma Sa Ma, accompanied by Mg. Tha Du and Mg. Shwe Ke, and others, went to the house of Mg. Ye Mo and Ma Ka U where Sa Tu was living. The marriage took place the same evening though Saw Tu and Ma Saw Ma did not sleep together that night. The customary cock and hen were not eaten till the next morning. Ma Sa Ma's relations went away leaving her in Ye Mo's house. Ma Sa Ma states that she lived with Saw Tu for a month after which he told her to go away as her star was not good. She says that four days after he turned her out she went to him and asked him to take her back, but with no result. On this occasion Mg. Shwe Zin accompanied her. Saw Tu denies the marriage and says that he never had anything to do with Ma Sa Ma. As regards the facts, I can see no reason to disbelieve Ma Sa Ma and those of her witnesses who deposed in her favour. There is no reason why Nan Saw Mo should depose falsely. She is the sister-in-law of Saw Tu and Saw Tu admits that she is on good terms with him.

Nan Saw Mo says that Saw Tu did ask her to go and ask for Sa Ma in marriage, that she went and did so, that Shwe Ke agreed and a date in the rains was fixed, that Ma Sa Ma and her companions came on the day fixed to Ma Ka U's house where Saw Tu was living and that the marriage took place. It is true that Ma Ka U gives evidence to the effect that Saw Tu would not take Ma Sa Ma in marriage, but at the same time she allows that Sa Ma did come to her house with Nan Saw Mo and Shwe Ko. She says Nan Saw Mo stated that she was going to give Sa Ma in marriage with Saw Tu. She allows that Sa Ma remained about a month at her house. It seems most improbable that if Saw Tu would not take Sa Ma she would have remained so long in Ma Ka U's house and not have gone back to her own people. Ma Ka U is a sister of Saw Tu. I cannot accept her testimony. Saw Tu says that he does not live in Ma Ka U's house and yet Ma Ka U says that he sometimes lives there.

As regards the defence witness Po Seik, he is a tenant of Saw Tu and states that Saw Tu lends him money without interest. Shwe Kho, in giving his evidence, says that he had never seen Ma Sa Ma before. As he is a near neighbour of Ma Ka U, this is very improbable if, as even Ma Ka U says, Ma Sa was staying in her house for a month. As regards Mg. Shwe Zin his testimony evidently refers to the visit Ma Sa Ma says that she made to Saw Tu after he had sent her away. Shwe Zin says that his son married Saw Tu's niece, but he does not know what relation he is to Sa Ma. He also says that Tha Du told him that Saw Tu and Ma Sa Ma had been married, that he heard this in the morning. This part of his testimony goes to corroborate Mg. Tha Du. There is also evidence that Nan Saw Mo offered Rs. 150 to settle the matter. If Saw Tu had nothing to do with Ma Sa Ma it is improbable that such a sum of money would have been offered. The incident is related by thugyi Mg Yan Win and there seems to be no reason to disbelieve him.

As far as the facts are concerned I can see no reason to doubt that Saw Tu did ask Nan Saw Mo to go and ask for Sa Ma in marriage, that Sa Ma with her relatives Shwe Ke and Tha Du did go to the house of Ma Ka U where Saw Tu was living and did live with him as man and wife for some time. Saw Tu is a widower. On the facts as I have found them according to Buddhist law there would be a legal marriage, but even looking at the facts according to the peculiar customs in use amongst Nat-worshipping Karens there seems to me to be sufficient on the record to find that there was a marriage The Sessions Judge refers to a book written by one Rev. T. Thanbyah. In Ch. 4 of this book the Karens' marriage customs are referred to. The first part of the chapter appears to refer to marriages between youths and maidens. It would seem that youths and maidens mean persons who had never been married before. In the present case, Mg Saw Tu is a widower. There was a match-maker Nan Saw Mo. As regards the man not going to the house of the woman, Saw Tu himself admits that when a man who has been married before marries a woman who has not been, they eat the cock and hen at the man's house. And Mg. Shwe Zin says that it could be possible for a woman to go to the man. A cock and hen were eaten though this was on the next morning. On the case as it stands I can see no reason to interfere with the order of the Magistrate and the proceedings will be returned to the Sessions Judge.

K. N./R.K. *Order upheld.*

A. I. R. 1914 Lower Burma 11

PARLETT, J.

Mg. Lu Mg. and *others*—Appellants.

v.

Maung Pu and *another*—Respondents.

Second Appeal No. 123 of 1912, Decided on 22nd July 1913.

(a) Specific Relief Act (1 of 1877), S. 9—S. 9 (2) does not bar regular suit on title in addition to or instead of suit under S. 9—Regular suit cannot change nature of suit.

Paragraph 2, S. 9, clearly shows that no one, though entitled to sue under that section, is bound to do so, and that he can always bring a regular suit founded upon title either in addition to or instead of a suit under that section.

A person by seeking his remedy early does not thereby alter the nature of his suit; 15 *All.* 384, *Dist.* 9 *W. R.* 602 and 25 *Mad.* 148, *Foll.* [P 12 C 1]

(b) Specific Relief Act (1 of 1877), S. 9—Plaintiff's possession as mortgagee contested and decided—Mortgage found not redeemed—Suit held not under S. 9 and appeal lies.

Where the plaintiff set up a title as mortgagee in possession of certain land of which defendants had taken possession and the defendants alleged that they had redeemed the mortgage and so extinguished the plaintiff's title on which his claim to possession was based and the Court of first instance held after framing issues on the question of title and taking evidence that the defendants had not redeemed the mortgage and that there was abundant evidence to prove the plaintiff's title to the land as mortgagee in possession:

Held: that both from the frame of the plaint and the course which the case took it was intended to be a suit based upon title and was never a suit under S. 9, Specific Relief Act and that the plaintiff could not be heard to assert the contrary and that therefore an appeal lay to the Divisional Court. [P 12 C 2]

Lambert—for Appellants.

Palit—for Respondents.

Judgment.—The sole question in this appeal is whether the suit was in fact brought under S. 9, Specific Relief Act. The Divisional Court has held that it was because (a) the plaintiff was entitled to bring such a suit and (b) the suit was filed within six months of the dispossession. In this Court the finding is supported on the further ground that the prayer in the plaint asks for possession only and not for a declaration of title. I consider none of these reasons to be

sound. Para. 2, S. 9, shows clearly that no one, though entitled to sue under that section, is bound to do so, but he can always bring a .regular suit founded upon title, either in addition to or instead of a suit under that section. As to the time when the suit was filed because a man seeks his remedy early he does not thereby alter the nature of his suit. As to the prayer I see no reason why a plaintiff who claims possession relying upon title need do more than set out his title and ask for possession.

It is true that in *Ram Harakh Rai* v. *Sheodihal Joti* (1) it was held that a Court should, in all cases in which it applies, give effect to the provisions of para. 1, S. 9, Specific Relief Act, whether that section is expressly pleaded or not, but that is no authority for refusing to entertain a suit based upon title merely because specific relief might be asked for and is not, as was ruled in the other case of *Kalee Chander Sen* v. *Adoo Shaikh* (2). S. 15, Act 14 of 1859, does not affect the general law on the matters to which it relates but provides a special remedy for a particular kind of grievance. In *Ramasawmy Chetty* v. *Paraman Chetty* (3) a case very like the present one the Allahabad ruling was not followed. The plaintiff sued to eject defendants from certain land claiming title to it by purchase and alleging that he had been forcibly dispossessed by defendants. The defendants denied both plaintiff's title and possession and set up title in themselves and alleged that they had long been in possession. The lower Court found that plaintiff failed to prove title by purchase and declared plaintiff entitled to possession under S. 9, Specific Relief Act, but dismissed the suit in so far as it claimed to have plaintiff's title established. The High Court held that the issue concerning title should have been tried. In the present case plaintiff set up a title as mortgagee in possession of certain land of which defendants had taken possession. Defendants alleged that they had redeemed the mortgage and so extinguished plaintiff's title on which his claim to possession was based. Issues covering the question of title were framed and evidence taken, after which the Court of first instance held that defendants had not redeemed the mortgage and that there was abundant evidence to prove plaintiff's title to the land as mortgagee in possession and on the strength of that title granted him possession. It appears to me both from the frame of the plaint and the course which the case took that it was and was always intended to be, a suit based upon title, and never a suit under S. 9, Specific Relief Act and that plaintiff cannot be heard to assert the contrary. An appeal therefore lay to the Divisional Court. I reverse the decree of that Court and direct that the appeal be re-admitted and disposed of according to law costs to follow the result.

K.N./R.K. *Appeal accepted.*

(1) [1893] 15 All. 384=(1893) A. W. N. 163.
(2) [1868] 9 W. R. 602.
(3) [1902] 25 Mad. 148=11 M. L. J. 403.

A. I. R. 1914 Lower Burma 12

HARTNOLL AND ORMOND, JJ.

In the matter of *a Second Grade Pleader.*

Civil Misc. Application No. 29 of 1913, Decided on 30th June 1914.

Legal Practitioners Act (18 of 1879)—Concealment of conviction is misconduct.

A pleader who conceals his past conviction by intentionally omitting to recite it in his application for admission is laible to be dismissed.

[P 15 C 1]

Hartnoll, J.—Though on the 15th September 1913, permission was given to the respondent to examine the further witnesses whom he desired to examine and though commissions were issued to Mandalay, Shwebo and Noakhali he has not taken any steps to get them examined nor has he appeared at any of the three places. One Mahomed Kassim was examined at Shwebo in his absence, but according to respondent he is not the man whom he wishes to be examined. His testimony taken in respondent's absence and also in the absence of cross-examination is also valueless.

The final hearing in this Court was fixed for 8th June last. Ahmed did not appear. A few days before this date he came to me at my house, but I refused to discuss the matter with him there and told him that he should answer in Court. He then said that he was not going to appear at Court.

The file of the District Magistrate, Rangoon, shows that one Farid Ahmed, purporting to be a licensed petition-writer at Moulmein, did apply on the 6th June 1913 to be allowed to practise as such in Rangoon. His petitions on the

file do not show that he ever gave the name of his father. In that respondent did not appear on the 6th June and therefore allows his case to be decided on the record as it stands. I am of opinion that no further inquiry should be made to ascertain whether this Farid Ahmed is the man who was convicted at Myitkyina in 1899. The name is not an uncommon one.

The case must therefore be decided on the record as it stands. Ths record shows that the Farid Ahmed who was convicted was the head clerk of the Mogaung Military Police Battalion from 1894 to 1898. In that year the Mogaung Battalion was amalgamated with the Myitkyina Battalion and in consequence the Farid Ahmed who was convicted was transferred as second clerk to the Myitkyina Battalion. He was then transferred as head clerk to the Mogok Battalion and from there brought back to Myitkyina under arrest, tried and convicted. The respondent is identified as this Farid Ahmed by men who served with him in those days. Subadar Sunni Ram swears to him. This man was with him for years and was pay havildar. He says that he used to see him daily. Mahomed Nakil and Rama Chandra Naidu who were fellow-clerks with the Farid Ahmed who was convicted also swear that respondent is the man who was convicted. They are still clerks at Mogok and Myitkyina respectively and gave evidence against him at his trial. Ramchandra Naidu even says that they occupied a house together. Doctor Ragunath Singha, who is an unwilling witness against him, recognizes him as the Farid Ahmed who was convicted. He was in those times in charge of the Myitkyina Police Hospital and subsequently in collateral charge of the Bhamo Jail Hospital where Farid Ahmed was confined. Again one Mahomed Abdul Wajid, now a second grade advocate in Upper Burma, but in 1899 head revenue clerk at Myitkyina, recognizes the respondent as the Farid Ahmed who was convicted. It is true that Afzul Ali and Tilak Ram say that he is not the man who was convicted, but there is no reason to doubt their evidence. Afzul Ali is a fellow-countryman of respondent, and Ramchandra Naidu whom there is no reason to disbelieve, says that Afzul Ali came to him and asked him not to give evidence against the respondent. Tilak Ram came together with him to Bassein and the two do not give the same account of their movements on arrival.

But the evidence of those who state that they identify respondent as the Farid Ahmed who was convicted, apart from there being no apparent reason why they should depose falsely, receives strong corroboration from the following facts. When respondent applied to be admitted as a second grade pleader of this Court in giving his history he stated of himself as follows: "Appointed licenced petition-writer by Major Browning, the then Deputy Commissioner, Shwebo, in June 1902, and worked there as such up to February 1903. Has been working as a licensed petition-writer at Rangoon from March 1903 with a view to pass the law examination." Now the register of petition-writers of the Shwebo District shows that on the 19th June 1902 one Farid Ahmed was registered as a petition writer and that his father's name is recorded as Muhshi Ezharul Huq. No name of Shaikh Faiz Ahmed appears in the years 1902, 1903 and 1904 in that register. Respondent allows that he used to write petitions in Shwebo by Major Browning's permission, but says that he received no written permission. This is an unlikely story in tself. The Farid Ahmed who was convicted gave his frther's name as Munshi Ishar-ul-Huque. Similarly as regards Rangoon the petition-writers' register shows that on the 16th March 1903 one Farid Ahmed was registered as a petition-writer the father's name being given as Munshi Ezhar-ul-Huq. No name of any person of the name of Shaikh Faiz Ahmed is shown in the register as having been licensed as a petition-writer. Respondent allows that he used to write petitions in Rangcon under one Mr. Klusaman when he was learning law under him, but says that he did not apply for nor received any license. He said in his application to this Court that he was appointed licensed petition-writer in Shwebo and worked as a licensed petition-writer in Ragoon. When he wrote he had passed the Second Grade Pleadership Examination and so in the ordinary course would know what they meant when he used the words he did. He gives no satisfactory explanation as to how he came to write as he did if he was not licensed. These facts seem to me to afford the strongest corroboration to the testi-

mony of those persons who say that they recognize him as the Farid Ahmed who was convicted. The registers contain no name of one Shaikh Faiz Ahmed whose father is said to be Shaikh Munshi Maziah Meah and they do contain the name of a man named Farid Ahmed whose father is said to be Munshi Ezharul Huq. Respondent in his application to this Court says that he did practise as a licensed petition-writer at Shwebo and Rangoon at the time the entries were made and even allows now that he did at those times write petitions at Shwebo and Rangoon. The Farid Ahmed who was convicted gave his father's name as Munshi Ishar-ul-Huque. The witnesses who identify him as the Farid Ahmed who was convicted are men who in the ordinary course, except perhaps Mahomed Abdul Majid, would be in daily or constant touch with him. There is no reason apparent why they should depose falsely.

In the absence of respondent showing that he did practise as a licensed petition-writer at Shwebo and Rangoon, as stated in his application to this Court in the name of Shaikh Faiz Ahmed whose father was reputed to be Shaikh Munshi Maziah Meah, it is a reasonable inference to draw that he practised as a licensed petition-writer at Shwebo and Rangoon, as stated by him in his application, under the name of Farid Ahmed whose father is recorded as being Munshi Ezharul Huq. This was the name and recorded parentage of the man who was convicted at Myitkyina in 1899, and who is identified by the witnesses I have named as being the respondent. To proceed with the analysis of the rest of the evidence produced by the Crown, Susin Kumar Ghosh who is senior Auditor of Local Fund Accounts says that he knew respondent as Farid Ahmed at Mandalay from June 1900 to August 1901. He states that respondent was then working as a clerk to Moulvi Abdul Gafoor Chowdhri. There is no reason to disbelieve this witness. The respondent states that he sometimes assisted Abdul Gafoor in his work though he was never employed by him. Banerji, a licensed petition-writer of Rangoon, says that in 1903 he knew respondent as Farid Ahmed, that he used to sign his name as such and that he used to work as a licensed petition-writer sitting in the verandah of the Deputy Commissioner's Court House at Rangoon.

It seems unnecessary to discuss the evidence of Balasundaram, Isar Singh, Habib Ali and Yunus Khan. If their evidence does not prove much against respondent, it certainly does not tell in his favour. Abdul Ganny's evidence does not go to prove anything one way or the other. Ansar Ali's evidence is in respondent's favour as far as it goes. But it does not meet the strong case against him. The rest of the evidence called for the Crown needs no comment.

The evidence for the defence remains for consideration. It should be noticed that respondent produces no evidence to show that he practised as a petition-writer at Shwebo or Rangoon under the name of Shiakh Faiz Ahmed. If he did not do so it should not be believed that he did not do so. The only witness who says that there was a petition-writer at Shwebo under that name is Mahomed Cassim and respondent does not acknowledge him as his witness. He was not cross-examined and, as I have noted, the name of Faiz Ahmed does not appear in the Court register. Under the circumstances his testimony carries no weight. Answar Ali who says that he is the half-brother of the Farid Ahmed who was convicted, states that respondent is not the man. Ezharul Huq, the father of the Farid Ahmed who was convicted, states that respondent is not the Farid Ahmed convicted. Ekbal Ahmed, the complainant in the case in which Farid Ahmed was convicted, gives evidence to the same effect. Both Anwar Ali and Ezharul Huq may be trying to save respondent from losing his means of livelihood. Ekbal Ahmed may be bought over. There is a great discrepancy in the evidence given by Anwar Ali and that given by the other two. Anwar Ali says that in 1904 he received a letter from his father telling him that Farid Ahmed was dead. Anwar Ali was examined in Bassein.

The other two were examined on commission at Chittagong. Ezharul Huq, when he gave his evidence, said that he had been informed his son had gone to Mecca and that he saw him four or five years before he gave his evidence. He never said that he was dead and his evidence is to the effect that his son Farid Ahmed is alive. Ekbal Ahmed says that Farid Ahmed brought a suit against him which was withdrawn about a year be-

fore he gave his evidence and that he has heard that he has gone to Mecca that he has not heard any news of his death. Mg. Lu Gale's evidence as to dates is vague and he allows that he was related to respondent's wife. Abdul Rashid, a pensioned hospital assistant, gives evidence to respondent working as a broker at Yandoon between 1895 and 1901. Abdul Kadir speaks of respondent as Faiz Ahmed, but his evidence as to dates is vague and untrustworthy. The Noakhali witnesses, Kazi Lutful Huq and Hasan Ali give evidence to knowing respondent at Feri some 20 years ago as Shaikh Faiz Ahmed, and prima facie there is no reason for disbelieving them; but their evidence must be considered with that produced for the Crown. Mr. Wells' evidence carries no value. The convicted Farid Ahmed was released on 2nd February 1900. The evidence of Khoda Baksh, Fazal Ahmed Khan and Puman Khan is vague as to dates and so is of no value. As regards the marks on respondent's body and those said to be on the Farid Ahmed who was convicted, we examined respondent when he was present before us and then came to the conclusion that the comparison did not help him. I made no note at the time, as I considered that at the adjourned hearing the note could be made. As far as I remember (but I will not be sure) there was a mark of an old scar on his face.

Considering the case as a whole I am of opinion for the reasons I have given that respondent is proved to be the Farid Ahmed who was convicted in 1899 at Myitkyina. He concealed this fact when applying for admission to this Court as a second grade pleader. Such conduct was inexcusable, and his past history is such that he should not be allowed to practise as a pleader. I would therefore dismiss him.

Ormond, J.—I concur.

K.N./R.K. *Application dismissed.*

A. I. R. 1914 Lower Burma 15

HARTNOLL, Offg. C. J. AND ORMOND, J.

Seena M. Haniff and Co.—Applicant.

v.

Liptons Limited—Respondents.

Criminal Ref. No. 84 of 1913, Decided on 2nd February 1914.

(a) Penal Code (45 of 1860), Ss. 482 and 486—Corporate body can be punished for offence under S. 482 or S. 486—Word "whoever" applies to bodies also.

A body corporate can be lawfully prosecuted and on conviction punished for an offence under S. 482 or S. 486. [P 18 C 2]

Per *Hartnoll, Offg. C. J.*—The word "whoever" in Ss. 482 and 486, I. P. C., does not refer only to a definite individual or definite individuals and can apply to a corporate body. [P 18 C 2]

(b) Merchandise Marks Act (4 of 1889), Ss. 6 and 7—Scope.

The word "he" in Ss. 6 and 7 includes "she" and "it" [P 20 C 1]

(c) Interpretation of Statutes— Reasons and objects — They may be considered— Clauses must be construed as whole and in reference to others.

Where the language of a satute is not clear to ascertain the real meaning the cause or necessity of the law being made should be considered. [P 19 C 1]

Every clause of a staute should be construed with reference to the context and the other clauses of the Act so as, so far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter. [P 19 C 1]

(d) Penal Code (45 of 1860), Ss. 482 and 486 — Burden of innocence is on accused when prima facie case is made out.

Under Ss. 482 and 486, I. P. C., the prosecution has not to prove the mens rea; and, as the burden of proving innocence is thrown on the accused under those sections, when once a prima facie case has been established, a limited company, when accused can prove its innocence by the evidence of its agents or servants or otherwise as it thinks fit. [P 20 C 2]

(e) Penal Code (45 of 1860), Ss. 482 and 486 —"Whoever" in Ss. 482 and 486 explained.

Per *Ormond, J.*—The word "whoever" with which Ss. 482 and 486 begin means the same thing as "every person who" in S. 2 (2) English Merchandize Marks Act, and shows that the provisions of the sections apply to persons generally. [P 20 C 2]

The scope of a penal section in an Act would (so far as the language is concerned) be the same whether it began with the words "every person who" or with the word "whoever" unless, the word "person" is defined so as to have a more restrictive or a more extended meaning than it in fact has. Limited Companies are not excluded from the operations of Ss. 482 and 486, I. P. C., and there is nothing inherent in the nature of a limited company which would prevent it from proving its innocence either by showing that it acted without intent to defraud under S. 482, or under S. 486 in any of the ways prescribed in that section. *Starey* v. *Chilworth Gunpowder Co.*, (1889) 24 *Q. B. D.* 90; *Kirshenboim* v. *Salmon and Gluckstein Ltd.* (1898) 2 *Q. B. D.* 19; and *Pearks, Gunston and Tee Ld.* v. *Ward*; *Hennen* v. *Southern Countis Dairies Co. Ltd.*, (1902) 2 *K. B.* 1, *Cons.* and *Foll.* [P 20 C 2; P 21 C 1]

Facts— The facts appear from the following reference, made by Twomey, J., under S. 11, Lower Burma Courts Act:

The complaint was of an offence under S. 482, I. P. C., "using a false trade or property mark", but the Magistrate in his order of discharge refers to it as a complaint under S. 486, "selling or possessing goods with a counterfeit trade or property mark." This discrepancy is however immaterial, for the same question of law arises in both cases, namely, whether a limited company is liable to prosecution for the offence. The District Magistrate decided that it is not.

No Indian cases bearing on the question have been cited. But there are many English cases showing that though a corporation aggregate cannot be guilty in ordinary cases of a criminal offence, it may be indicted for libel or for nuisance, and wherever a duty is imposed by statute in such a way that a breach of the duty amounts to disobedience of the law then, if there is nothing in the statute either expressly or impliedly to the contrary, a breach of the statute is an offence for which a corporation may be indicted. Lord Halsbury's Laws of England, Vol. 8, p. 391; see also Archbold's Criminal Pleading, 24th Ed., p. 7. It has also been held that it is impossible now to apply the maxim as to mens rea generally to all statutes and it is necessary to look at the object and terms of each Act to see whether and how far knowledge or a particular intent is of the essence of the offence created. Case given in Archbold on Pleading, 24th Ed., p. 21. As pointed out in Maxwell's work on the Interpretation of Statutes, 4th Ed., p. 153, there is now a large body of municipal law which has been framed in such terms as to make an act criminal without any mens rea.

Sections 482 and 486, I. P. C., are based upon S. 2, English Merchandize Marks Act, 1887, and S. 486 follows closely the wording of S. 2, sub-S. 2. In neither case it is necessary for the prosecution to establish that mens rea is involved to the extent that the accused can rebut the charge against him by proving that he acted "without intent to defraud", (S. 21, English Sttaute, and S. 482, I. P. C.,) or that he acted "innocently", (S. 2 (2), of the English Act, and S. 486, I. P. C.). With reference to the word "defraud" in the English statute it has been held in *Starey* v. *Chilworth Powder Company* (1) that it is not used in the sense of putting off a bad article on a customer in order to get money unfairly. "The Act is directed against the abuse of trademarks, and the putting off on a purchaser of not a bad article, but an article different from that which he intends to purchase and believes that he is purchasing", also as regards the word "innocent" contemplated by the Act, is merely innocence of an intention to infringe that Act of Parliament: per Channell, J., in *Christe, Manson and Woods* v. *Cooper* (2).

In *Starey* v. *Chilworth Gunpowder Company* (1) the company was held quilty of the offence of applying a false trade description to certain gunpowder supplied by them under a contract and it was held that the company acted with intent to defraud within the meaning of S. 2 (1). It was not contended in that case that it would be impossible for a body corporate to prove such a defence as absence of fraudulent intent and the learned Judges, Coleridge, L. C. J., and Mathew, J., apparently saw no such objection to the prosecution.

In another case of *Kirshenboim* v. *Salmon and Gluckstein Limited* (3), Sal- and Ghuckstein Ld. were found guilty of an offence under S. 2 (2) in having sold goods under a false trade description.

They sold as "guaranteed hand made" cigarettes which were in fact machine made. The Court consisting of five Judges, Lord Russell, L. C. J., presiding, found that the company had acted deliberately and not "innocently."

In the same year in the case of *Coppen* v. *Moore* (4) the construction of the Merchandize Marks Act was further considered as regards the criminal liability of a master for acts done by his servants in contravention of the Act when such acts were done by the servants within the scope or in the cause of their employ-

(1) [1889] 24 Q. B. D. 90=59 L. J. M. C. 13=62 L. T. 73=38 W. R. 204=17 Cox. C. C. 55=54J. P. 436.
(2) [1900] 2 Q. B. D. 522=69 L. J. Q. B. 708=64 J. P. 692=49 W. R. 46=83 L. T. 54=16 T. L. R. 422.
(3) [1898] 2 Q. B. D. 19=62 J. P. 439=67 L. J. Q. B. 601=78 L. T. 658=14 T. L. R. 395=46 W. R. 573=19 Cox. C. C. 127.
(4) [1898] 2 Q. B. D. 306=62 J. P. 453=67 J. Q. B. 689=78 L. T. 520=14 T. L. R. 414=46 W. R 620.

ment. A Bench of six Judges, Lord Russell, L. C. J., presiding, held that it was clearly the intention of the legislature to make the master criminally liable for such acts unless he was able to rebut the prima facie presumption of guilt by one or other of the methods pointed out in the Act. The Lord Chief Justice said: "We conceive the effect of the Act to be to make the master or principal liable criminally (as he is already by law civilly) for the acts of his agents and servants in all cases within the sections with which we are dealing where the conduct constituting the offence was pursued by such servants and agents within the scope or in the course of their employment subject to this: that the master or principal may be relieved from criminal responsibility where he can prove that he had acted in good faith and had done all that it was reasonably possible to do to prevent the commission by his agents and servants of the offences against the Act."

Reading the judgment in *Coppen* v. *Moore* (4) with the judgment in the case of *Krishenboim* v. *Salmon and Gluckstein* (3) it appears to me that a limited liability company is on the same footing as any other master or principal and can be held liable to the same extent for the acts of its agents and servants in contravention of the English Merchandize Marks Act. The decision in *Coppen* v. *Moore* (4) is based on the view that having regard to the language, scope and objects of the Act the legislature intended to fix criminal responsibility upon the master for acts done by his servants in the course of their employment, though such acts were not authorized and might have been expressly forbidden: See Maxwell, p. 159.

As mens rea, a particular intent or state of mind is not of the essence of the offence, there is no reason why a corporation should not be prosecuted like an individual master or principal. By way of defence, it is open to the corporation, as it is to the individual master, to prove good faith, i. e., the exercise of due care and attention, and that all possible steps have been taken by the corporation to prevent breaches of the Act by its agents and servants.

For the respondents the later English cases *Christie Manson and Woods* v. *Cooper* (2) and *Pearks, Gunston and Tee Ld.* v. *Ward*; *Hennen* v. *Southern Counties Dairies Company, Ltd.* (5), have also been referred to. But I can find nothing in these cases to impair the authority of *Salmon and Gluckstein's* case (3), although Channell, J., in an obiter dictum in *Pearks, Gunston and Tee, Ltd.* v. *Ward*; *Hennen* v. *Southern Counties Dairies Company, Ltd.* (5) expressed some hesitation as to the criminal liability of a body corporate under S. 2, Merchandize Marks Act.

It is clear that a limited company could be prosecuted and punished in England for such an offence as that charged against the respondent company in the present case.

The respondents however stand on much stronger ground in urging that the Indian law at present differs in this respect from the law of England.

In the English statute the penal provisions run: "Every person who" etc., "shall be guilty of an offence against this Act" and the word "person" is expressly defined in S. 3 so as to include "any body of persons, corporate or unincorporate." The word is similarly defined in S. 11, I. P. C., but in the penal provisions Ss. 482 and 486, and indeed in the penal clauses throughout the Code the word "person" is not to be found. Each penal clause lays down that "whoever" commits the offence in question "shall be punished with" etc., etc.. and though the Code defines "person," the word "whoever" is left to be interpreted according to ordinary usage. It is equivalent to "any" person "who" or "whatever person," but the person contemplated in the word "whoever" according to ordinary usage is, I think, a natural person, i. e., an individual human being, and it does not connote a corporation which is a "person" only in an artificial, technical, judicial sense. It is by no means clear that the framers of the Code intended to exempt corporations from punishment for offences under the Code. Indeed the use of the word "person" in S. 268, definition of the public nuisance, seems to point the other way, for in that section I think the word "person" should be construed according to the definition in S. 11. Moreover, the chapter which begins with S. 268 includes

(5) [1902] 2 K. B. D. 1=71 L. J. K. B. 656=66 J. P. 774=87 L. T. 51=18 T. L. R. 538=20 Cox, C. C. 279.

several offences for which corporations can be prosecuted in England by virtue of the definition of "person" in special enactments and in the England Interpretation Act of 1889. But if the intention was to make corporations liable for offences under the Indian Penal Code, I think it has been frustrated by the use of the form "whoever" instead of "any person who" or "every person who" in the penal clauses. It is true that S. 11 of the Code lays down that every person shall be liable to punishment. But the learned commentators on the Code agree in thinking that "person" in this section has not the extended meaning given by S. 11 and this view appears to me to be correct.

It is suggested that in adopting the English statute of 1887 to India the legislature abstained from reproducing the form "every person who," merely because the form "whoever" was already the common form in the penal sections of the Indian Penal Code. But it might be argued with equal force that the Indian legislature in avoiding the use of the word "person" in the new sections enacted in 1889, thus abandoning the English form, signified their intention to exempt bodies corporate from prosecution for offences relating to merchandize marks. If the form "every person who" had been used then these penal sections read with S. 11 of the Code would have rendered bodies corporate liable to prosecution in India as they are in England.

I note that though the form "whoever" is used in the penal clauses throughout the Penal Code, this form is not universal in special and local laws. For examples of the use of the form "any person who" reference may be made to the Sea Customs Act, 1878, Schedule of Ch. 16, Nos. 8, 9, etc., Arms Act, 1878, S. 3, Excise Act, 1896, Ss. 46 to 52. By virtue of the definition of "person" in the General Clauses Act it appears that unless where a contrary intention appears expressly or impliedly, a corporation could be prosecuted for offences against special and local laws where the form of the penal provision is "any person who", etc., or "every person who" etc.: Whitley Stokes' Anglo-Indian Codes and Gour's Penal Law of India; Notes on S. 2 Pedal Code.

My opinion is therefore that the respondent company is not liable to prosecution for an offence under S. 482 or S. 486, I. P. C. But as the question is one of some public importance and as the learned counsel engaged on both sides have asked me to refrain from passing final orders and to refer the question to a Bench under S. 11, Lower Burma Courts Act, I think it is expedient to take this course. I refer the question whether a body corporate can lawfuly be prosecuted and on conviction punished for an offence under S. 482 or S. 486, I. P. C.

Hartnoll, Offg. C. J.— The question referred to us is whether a body corporate can lawfully be prosecuted and on conviction punished for an offence under S. 482 or S. 486, I. P. C. Twomey, J., has found that in England a limited company such as the respondent company can be prosecuted and punished for similar offences under the English Merchandise Marks Act, 1887; and from the cases cited by him there can be no doubt as to the correctness of his finding; but on a consideration of the word "whoever" used in Ss. 482 and 486, I. P. C., he has formed the opinion that in India the prosecution of a company under those sections does not lie.

Sections 478 to 489, I. P. C., were enacted by S. 3, Merchandise Marks Act, 1889, and enacting the penal sections amongst them the word "whoever" is used and not the words "any person who." The word "whoever" is used throughout the Penal Code in its penal sections. S. 11, I. P. C., defines the word "person" thus: The word "person" includes any company or association or body of persons whether incorporated or not. If the words "any person who" were used in Ss. 482 and 486, I. P. C., there is no doubt that there would be much stronger ground for holding that a company could be prosecuted under those sections; but it is argued that the word "whoever" can only refer to a definite individual or definite individuals, and cannot apply to a corporate body. It may possibly be said that the word "whoever" may be held to include a body of persons associated together in their collective capacity for the purpose of trade but, on the other hand, taking the word in its strict grammatical meaning it may be said that it cannot have any such meaning. Assuming that

this is so, then it appears to me that there is an ambiguity in the Penal Code. S. 11 may be said to render a company criminally liable in certain classes of cases, whereas the use of the word "whoever" in the penal sections relating to such cases renders it impossible to punish them. To take a concrete instance: S. 268, I. P. C., says: "A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity." Taking the definition of the word "person" in S. 11, it would certainly appear that a company can be guilty of a public nuisance, but in the ensuing penal sections as the word "whoever" is invariably used, a company cannot be punished.

If the language of the Penal Code were clear and unambiguous as to whether a company can be prosecuted or not it should, beyond doubt, be obeyed; but where there is an ambiguity or the language is not clear it is a well-known principle that to ascertain the real meaning, the cause or necessity of the law being made should be considered. Again, it has been said that every clause of a statute should be construed with reference to the context and the other clauses of the Act so as, so far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject matter: per Lord Davey in *Canada Sugar Refining Co. Ltd.* v. *Queen* (6). Now applying these principles to the present case, Act 4 of 1889 of the Indian legislature is named: "An Act to amend the law relating to fraudulent marks on merchandise." It clearly has the object of protecting the public in its purchases so that they may not be deceived by false trade descriptions, and another of its objects is clearly the protection of honest trade, for instance, the prohibition of one trader using the mark of another or a similar mark with a view to selling his goods as those of such other firm. When Act 4 of 1889 was enacted the General Clauses Act (1 of 1868) was in force and "person" is defined in S. 2 (3) of it as follows: "Person" shall include any company or association or body of individuals whether incorporated or not. Act 1 of 1868 was repealed by the General Clauses Act 1897, but S. 4 (1) of this latter Act applies this definition, unless there is something repugnant in the subject or context, to all Acts of the Governor-General in Council made after the third day of January 1868. It therefore applies to the Indian Merchandise Marks Act 1889, subject to the above proviso. S. 6 of that Act says that, if a person applies a false trade description to goods he shall, subject to the provisions of the Act, and unless he proves that he acted without intent to defraud, be punished according to law.

The section is analogous to S. 482, I. P. C., except that one deals with a false trade description and the other with a false trade or property mark. Similarly, S. 7, Merchandise Marks Act, makes a person punishable who sells or exposes or has in his possession for sale or any purpose of trade or manufacture any goods or things to which a false trade description is applied, unless he proves certain facts. It is similar to S. 486, I. P. C., except that that section refers to counterfeit trade or property marks. The facts by which an accused is allowed to prove his innocence are the same in S. 486, I. P. C., as in S. 7, Merchandise Marks Act. Now there is nothing, in my opinion, repugnant in the subject or context in Ss. 6 and 7, Merchandise Marks Act, to prevent a "person" including a company. There are many companies nowadays and it is just as important to protect the public and other traders against their dealings as to protect them from the dealings of individuals. It may be argued that as the word "he" is used in referring to the word "person" in Ss. 6 and 7, Merchandise Marks Act, and that as under S. 13, General Clauses Act, though the word "he" includes the word "she" it does not include the word "it," it is repugnant to the context to give the word "person" in these two sections the extended meaning given to it by the General Clauses Act. But, in my opinion, there is no substance in such an argument. The meaning to be attached to the word "he" in Ss. 6 and 7, Merchandise Marks Act, seems to be a ques-

(6) [1898] A. C. 735=67 L. J. P. C. 126=79 L. T. 146=14 T. L. R. 545.

tion of grammar. Giving the word "person" in those sections the extended meaning enacted for it in the General Clauses Act, in subsequently referring to it by means of a pronoun the predominating pronoun "he" would be used and this would include "she" and "it". It would not be necessary to refer to the word "person" by the words "he," "she" and "it" whenever it became necessary to use a pronoun. To take an analogous sentence, "If one feels tired, he cannot work." Here the word "one" may be either of the masculine or feminine gender, and yet, in referring to it the pronoun "he" is used, not both "he" and "she." For the above reasons I can see no reason why a company cannot be prosecuted and punished under Ss. 6 and 7, Merchandise Marks Act, and if this is permissive it would be very incongruous to hold that a company is liable to punishment in respect of dealings with false descriptions, whereas it is not so liable in dealings with false trade and property marks.

It seems to me that the intention of the legislature must have been to render a company liable, or not liable, as the case may be, in respect of both classes of dealings, and as it has, in my opinion, clearly made a company liable with respect to one class, the intention was no doubt, to render them liable in respect of the other class. It must be remembered that Ss. 482 and 486, I. P. C., are enacted in S. 3, Merchandise Marks Act, just before Ss. 6 and 7 of it and that when the Merchandise Marks Act was enacted the General Clauses Act of 1868 was in force which defined the word "person" as set out by me above. But learned counsel for the respondent company argued that Ss. 482 and 486, I. P. C., were not applicable to companies as a company, can have no mens rea and so is unable to prove absence of intent to defraud and those facts set out in S. 486 establish innocence. Though the argument was not expressly raised in the cases of *Starey* v. *Chilworth Gunpowder Co.* (1), and *Kirshenboim* v. *Salmon* and *Gluckstein Limited* (3), yet it is not mentioned by the learned and eminent Judges who decided those cases, and if there was any substance in it, it is not probable that it would have escaped attention. In the case of *Pearks, Gunston* and *Tee Ltd.* v. *Ward*; *Hennen* v. *Southern Counties Dairies Company Ltd.* (5), Channell, J., considered the same argument in respect to Ss. 3 and 5, Sale of Food and Drugs Act, 1875, and though he did not decide the question definitely, in an obiter dictum he said that he was inclined to think that a Corporation would come under S. 3 as well as under S. 6. It is clear that the prosecution has no mens rea to prove under Ss. 482 and 486, I. P. C., and as the burden of proving innocence is thrown on the accused under those sections when once a prima facie case has been established, I can see no good reason why it cannot do so by the evidence of its agents or servants or otherwise as it thinks fit.

I would answer the question referred in the affirmative.

Ormond, J.—Section 6, Merchandise Marks Act, and S. 2 (1), (d) of the English Act both make the applying of a false trade description by a "person" an offence unless he proves that he acted without intent to defraud. Both S. 486, I. P. C., and S. 2, (2) English Merchandise Marks Act, make it an offence to sell or to have in possession goods to which a counterfeit (or forged) trademark is applied "unless he proves that otherwise he had acted innocently;" but S. 2 (2), English Act, begins with the words "every person who" and S. 486, I. P. C. begins with the word "whoever."

The word "whoever" means the same thing as "every person who" and shows that the provisions of the section apply to persons generally. The scope of a penal section in an Act would (so far as the language is concerned) be the same whether it began with the words "every person who" or with the word "whoever" unless the word "person" is defined so as to have a more restricted or a more extended meaning than it in fact has. In law a corporation (which includes a limited company) is a person, apart altogether from any General Clauses or Interpretation Acts, and if from the language of a section, its provisions apply to persons, generally a limited company, being a person, would be included, unless there was something to show that the section was not intended to apply to such a person. Moreover there is, I think, a clear indication that the Indian legislature in-

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tended that the words "whoever" in Ss. 482 and 486, I. P. C., should have the same meaning and scope as the words "every person who" for these sections were inserted in the Indian Penal Code by S. 3, Merchandise Marks Act, and S. 6 of that Act, which begins with the words: "If a person" makes it an offence to apply a false trade description, it would be unreasonable to suppose that by the use of the word "whoever" a more restricted scope was intended in S. 3 than was intended in S. 6.

As to the possible argument that the language in both the English and Indian Acts, shows that a corporation was not intended to be included, because the word "he" is used and the fact that under the General Clauses Act and the English Interpretation Act, though "he" would include "she" the word "he" would not include "it," in my opinion it would be correct to say "a male, female or artificial person who", (not "who or which"), and it would be correct to say if a male, female or artificial person does so and so, "he shall" (not "he, she or it shall"). This point was not noticed, or probably was thought not worth considering in the two cases of *Starey* v. *Chilworth Gunpowder Co. Ltd.* (1) and *Kirshenboim* v. *Salmon and Gluckstein Ltd.* (3). In my opinion the language in Ss. 482 and 486, I. P. C., does not exclude a limited company.

We come then to the question whether there is anything to show that a limited company was intended to be excluded from the operation of Ss. 482 and 486, by reason of the inherent nature of a limited company or of the object of the sections. The object of the sections is to prevent the use of a false trade-mark and the selling of goods marked with a false trade-mark. It is obvious that a limited company could do such things, and therefore it would prima facie come within the object of the sections. But it can act only through its agents. It is clear I think from the decision in *Coppen* v. *Moore* (4), that upon a true construction of these sections the master was intended to be made criminally responsible for acts done by his servants in contravention of these provisions, where such acts are done within the scope or in the course of their employment, unless he is able to rebut the prima facie presumption of guilt by one or other of the methods pointed out in the sections.

It is contended that a limited company as such could not prove an absence of mens rea under Ss. 482 and 486, inasmuch as it has no mind. But because it can act only through its agents, if it proved that its agents acted without intent to defraud under S. 482, or that its agents had fulfilled the conditions mentioned in Cls. (a) and (b) or (c) of S. 486, as the case might be, it would prove its own innocence. The two cases of *Starey* v. *Chilworth Gunpowder Co. Ltd.* (1) and of *Kirshenboim* v. *Salmon and Gluckstein Ltd* (3) are instances of a limited company having been convicted under the English provisions which correspond to Ss. 482 and 486, I. P. C. In the first case the Justices held that there was no false trade description within the meaning of the statute, and that there had been no intent to defraud on the part of the company, inasmuch as the gunpowder delivered was as good as the powder contracted for. It was held that the supplying of goods bearing a false trade description would be a "fraud" within the meaning of the statute although there was no intention to cheat, and the case was remitted to the Justices to determine whether the company had acted without intent to defraud or that having taken all reasonable precautions against committing an offence they had no reason to suspect the genuineness of the trade description, or that they gave all information in their power with respect to the person from whom they obtained the goods. I observe from the dates given in the reports that *Salmon and Gluckstein's* case (3) was decided at a time when the case of *Coppen* v. *Moore* (4) was pending for judgment. Lord Russell, C. J., and Wright, J., were two of the Judges in both cases, thus both those cases must have been present to their minds at the time.

In *Kirshenboim* v. *Salmon and Gluckstein Ltd.* (3) it was held that the company had sold goods under a false trade description, and that, because it had acted deliberately, it had not acted "innocently."

Being guided by the above English decisions, I am of opinion that limited companies are not excluded from the operation of Ss. 482 and 486, I. P. C.,

and that there is nothing inherent in the nature of a limited company which would prevent it from proving its innocence, either by showing that it acted without intent to defraud under S. 482, or under S. 486, in any of the ways prescribed in that section. In the latter case of *Pearks, Gunston and Tee Ltd.* v. *Ward*; *Hennen* v. *Southern Counties Dairies Co. Ltd.* (5), a case under S. 6, Sale of Food and Drugs Act, which contained an absolute and unqualified prohibition, a company was held liable and Lord Alverstone, C. J., expressed an obiter dictum that different considerations might apply in cases under Ss. 3 and 4 of the Act, inasmuch as absence of knowledge would be a good defence to charges under those sections. He did not say that in his opinion a limited company could not be liable under those sections and the above two cases against limited companies were not cited. Channell, J., thought that a limited company could be liable.

In my opinion a limited company can be prosecuted for offences under Ss. 482 and 486, I. P. C.

The question of jurisdiction in this case and the question of what is the proper procedure to adopt in prosecuting a limited company are not before us.

K.N./R.K. *Order accordingly.*

A. I. R. 1914 Lower Burma 22

TWOMEY, J.

Mg. Mya and *another*—Defendants—Appellants.

v.

Moosaji Ahmed and *Co.* —Plaintiff—Respondent.

Second Appeal No. 20 of 1912, Decided on 26th May 1913.

Contract Act (9 of 1872), S. 16 — Contract for repayment of what is due—No advantage taken—Plea of undue influence cannot stand —Proof of use of dominating influence is required.

Plaintiff was lawfully entitled to claim Rs. 4,800 from the defendant. The latter absconded and there were some grounds for proceeding against him not only civilly but also criminally. The plaintiff by way of compromise accepted an immediate payment of Rs. 2,000 and took a bond with two sureties for the balance to be paid with interest at 6 per cent. on the whole debt within two years:

Held: that the bargain in the bond being fair and reasonable the plea of undue influence collapsed. [P 23 C 1]

In order to avoid a contract for undue influence the promisor must show that the promisee used his dominating position to obtain an unfair advantage. [P 23 C 1]

Halkar—for Appellant.

Auzam—for Respondent.

Facts. — The appellant Mg. Mya owed Messrs. Moosajee Ahmed and Co. Rs. 4,800 which he was unable to pay. The debt was not paid and the firm instituted criminal proceedings against Mg. Mya and a warrant was issued for his arrest. Mg. Mya's friends came to his assistance and a bond was signed whereby it was agreed that Rs. 2,000 in cash should be paid down and the remaining sum of Rs. 2,800 repaid within two years, with interest calculated at 6 per cent. per annum. Moosajee Ahmed and Co. sued for the payment of Rs. 400, unpaid principal, and interest, Rs. 346-4-0. The appellants admitted execution of the bond, but in their first written statement pleaded that there was an oral agreement that the interest should not be enforced and that they have offered to pay Rs. 400, the principal due. It was admitted on behalf of the firm that the latter sum had been tendered but refused as interest was not paid. Mg. Mya further pleaded that his consent to the bond had been obtained through undue influence and that the agreement was voidable.

The Subdivisional Judge found that there was no undue influence exercised and passed a decree against all the appellants for Rs. 400, with costs, and against Mg. Mya alone for the interest with costs, and the pleader's fees on this sum.

Judgment.—I think the lower Courts erred in thinking that any question of undue influence arose in this case. So far as the record shows the plaintiff-respondent was lawfully entitled to the amount Rs. 4,800, which he claimed from Mg. Mya and his wife. As Mg. Mya absconded it appears that there were some grounds for proceeding against him not only civilly but in a criminal Court. The plaintiff by way of compromise accepted an immediate payment of Rs. 2,000 and took a bond with two sureties for the balance Rs. 2,800 to be paid with interest at 6 per cent. on the whole debt within two years. These circumstances do not amount to undue influence. If the applicants refused to sign, Mg. Mya might have been sent to prison as the result of the proceedings which the plaintiff-res-

pondent was taking. The plaintiff-respondent was therefore in a position to bring pressure to bear upon the appellants and to that extent was in a position to dominate their wills. But more is required than this. The appellants have to show that the respondent used his dominating position to obtain an unfair advantage: S. 16. Contract Act: It is clear that the respondent did not do so. The bargain in the bond is fair and, reasonable and therefore the plea of undue influence collapses.

The lower Courts in my opinion should have decreed against the sureties as well as the principal debtors (the appellants) for the whole amount claimed. As it is, the appellants have been directed to pay the balance of the principal plus the interest on the whole debt as provided in the bond, while the sureties (who have not appealed) have been held liable only for the balance of the principal.

I cannot see that the appellants have any legitimate ground of complaint and I dismiss this appeal with costs.

K.N./R.K. *Appeal dismissed.*

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* A. I. R. 1914 Lower Burma 23

HARTNOLL, OFFG. C. J. AND ORMOND, J.

Emperor

v.

A. J. Cooke and *others*—Respondents.

Criminal Revn. No. 347-B of 1913, Decided on 23rd February 1914.

*** (a) Penal Code (45 of 1860), S. 294-A—Club used for social purpose and also for gaming — Member of executive committee will be deemed to have "kept" a gaming house—Use need not be exclusively for gaming.**

The members of the committee of a club who exercise full control over club matters, inclusive of the premises, "keep" the premise of the club within the meaning of that expression as used in S. 294. [P 25 C 1]

Where a house is kept open for a double purpose., viz, as an honest social club for those who do not desire to play as well as for the purpose of gaming for those who desire to play, it is a house opened and kept for the purpose of gaming, and it is not necessary to show that the house is used exclusively for the purpose of drawing a lottery: *Jenks* v. *Turpin*, (1884) 13 *Q. B. D.* 505, *Foll.* [P 25 C 1]

(b) Penal Code (45 of 1860), Ss. 294-A and 34—Where common object is to keep gaming house all members are individually guilty.

Where the common object is the keeping of a place for the purpose of drawing a lottery not authorized by Government, all who engage in such an object are individually guilty and can be prosecuted jointly or severally. [P 25 C 2]

(c) Evidence Act (1 of 1872), S. 114—Official acts are presumed to be regularly done.

The presumption is that official acts are regularly performed. [P 26 C 1]

(d) Penal Code (45 of 1860), S. 294-A—Collector is not authorised to sanction lottery—Mere taking of income-tax from club on profits from lotteries is no authorisation.

A Collector who is a revenue officer is not authorized to sanction a lottery, nor would the mere act of taking income-tax from the club on the profits of the lotteries constitute authorization: [P 26 C 2]

*** (e) Penal Code (45 of 1860), S. 294-A—Words "not authorized" explained—Burden of proving authority is on accused.**

The words "not authorized" in S. 294-A, mean no more and no less than "unless authorized, or not having been authorized or without authority," and are in the nature of an exception or proviso, and under S. 105, Evidence Act, the burden of proof lies on the accused to show that the lottery was authorized by Government: *Apothecaries' Company* v. *Worburton*, 2 *B. & Ald.* 40 and *Martin* v. *Banjamin*, (1907) 1 *K. B. D.* 64, *Foll.* *Rex* v. *James*, (1902) 1 *K. B. D* 540, *Dist.* [P 26 C 2, P 27 C 1].

(f) Penal Code (45 of 1860), S. 294-A—"Proposal" in S. 294-A. explained.

A drawing list which set out on the first page the list of the winners drawn on a certain day in the month of May, and on its back contained the description: "The sweep for June is now open. It will close on 20th June 1913. Settling day 23rd June 1913. All tickets must be taken in the name of a member, etc.," was held to be a proposal within the meaning of S. 294-A, I. P. C. [P 27 C 1]

Hartnoll, Offg. C. J.—This case has been referred to this Court by the District Magistrate of Rangoon under the provisions of S. 307, Criminal P. C. The five accused, E. J. Cooke, G. Shead, H. Henderson, F. J. Snow, and T. D'Silva have been tried before the District Magistrate of Rangoon and a jury under the following charges:

Firstly.—That you, between April 1910 and 22nd June 1913, did keep an office or place for the purpose of drawing a lottery not authorized by Government at 279, Dalhousie Street, and thereby committed an offence punishable under S. 294-A (i), I. P. C., and within my cognizance.

Secondly.—That you, on or about the (1) 22nd May 1912, (2) 22nd July 1912, (3) 22nd May 1913, did publish proposals to pay sums on an event or contingency relative or applicable to the drawing of tickets in a lottery not authorized by

Government by publishing lists of winners ascertained at drawing held on above dates and thereby committed an offence punishable under S. 294-A (ii), I. P. C., and within my cognizance.

The jury brought in a verdict of not guilty on all the charges; but the District Magistrate differed from them. He considers that all the accused are guilty under the first head of the charges; and that A. J. Cooke and T. D'Silva are guilty under the second head of charge. It is not denied that we have full powers to convict the accused in accordance with the opinion expressed by the District Magistrate, but it is submitted that in any case the verdict of the jury should not be interfered with. S. 307 (3), Criminal P. C., enacts that we may exercise any of the powers which we may exercise on an appeal, and that, subject thereto, we shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict the accused of any offence of which the jury could have convicted him upon the charge framed and placed before it. In this case the words "District Magistrate" and Sessions Judge are synonymous: S. 451 (6), of the same Code.

It is not denied that a lottery was drawn monthly from April 1910 to June 1913 at No. 279, Dalhousie Street, Rangoon. These premises were tenanted by the Indian Telegraph Association Club at first in part, but subsequently wholly. The lottery started in a very small way, but assumed in the end very large proportions. The takings for June 1913 amounted to Rs. 1,82,480. All the accused were members of the Committee of the aforesaid Club; but they submit that they did not keep any office or place for the purpose of drawing the lottery. They assert that the lotteries were managed by the club through its committee, that the premises belonged to the club, that in any case five members out of a committee of 19 members cannot be held to keep the premises; that it was the club who kept the premises; that perhaps all the members of the club might be held to keep the premises, or all the members of the committee, but certainly not, only five members out of 19. Certain cases were quoted showing that club servants or members of club committees could not be sued civilly for goods supplied to clubs, and it was urged that the five accused could not have a suit brought against them personally for use and occupation. So, it is said, how can they be held to keep the premises? Such cases do not seem to me to be of assistance in arriving at a conclusion in the present case as to whether the five accused kept the premises within the meaning of S. 294-A, Part 1, I. P. C. They depend on whether there has been a contract according to which members of a club or club committee become personally liable or not for club debts.

The circumstances must differ in each case and depend on matters, such as the actual terms of contracts— the Club rules—and so on. Even supposing that members of a club committee would not be personally liable for goods supplied to their club, I consider that in certain circumstances they should be held to keep the premises within the meaning of S. 294-A, Part 1, I. P. C.; and the evidence must be examined to see whether or not the accused should be held to so keep the premises in the present case. The minute book, Ex, W., shows beyond doubt that the management of this club rested with the committee. At a meeting of the committee held on 3rd March 1912, at which Cooke, Henderson, Shead and D'Silva were present, it was agreed that the lower flat of the premises alongside the club be engaged at a rental of Rs. 40 per mensem as well as two temporary clerks on Rs. 40 each (tentatively) in order to carry out the writing of money orders, free of cost for the public with the object of gradually stopping cash sales, and encouraging the services of the post office, thereby safeguarding the interests of the sweep. At another meeting held on 5th January 1913, at a meeting at which all the accused except Shead were present, it was proposed by Henderson and seconded by D'Silva that the president enter into negotiations for a lower rental, failing which the sum of Rs. 850 be given on a year's lease. This proposal was made in discussing Misquith's letter. Misquith was then the owner of 279 Dalhousie Street. The above extracts from the committee book show that the committee had the power of renting premises and the very premises set out in the charge in the second instance. This power must be taken to have been dele-

gated to them by the general body of members.

In Stroud's Judicial Dictionary it is said: "To keep a place or thing involves the idea of having over it the immediate control of a character more or less permanent." The minute book and the accounts show that the committee exercised full control over club matters, inclusive of the premises. I would instance item 21 of the meeting of 6th April 1913. It was ordered that the accounts be audited every month by a committee member. This shows that the committee had full control over the accounts. Looking at the accounts for February 1913, it is seen, a carpenter was paid for fixing woodwork at the entrance to the club, that servants are paid and supplied with uniform. It seems needless to multiply instances. The immediate control of the premises was clearly vested in the committee of which the five accused were members. I would therefore hold that for the purposes of S. 294-A, I. P. C., the committee kept the premises, and that the accused cannot be allowed to shift their responsibility on to the general body of members or to the club, which is an abstract entity or incorporeal body. The next question for consideration is whether it is proved that the premises were kept for the purposes of drawing a lottery. They were clearly also kept for the purpose of a social club as well, and this being so, it is argued that they were not kept for the purpose of drawing a lottery; that to incur liability under S. 294-A, I. P. C., it must be shown that the premises were kept exclusively for such a purpose. In the case of *Jenks* v. *Turpin* (1), where certain persons were convicted of keeping and using premises for the purpose of unlawful gaming and assisting in the management, Hawkins, J., said: "If the house had been kept open for a double purpose, viz. as an honest social club for those who did not desire to play, as well as for the purpose of gaming for those who did, it would nonetheless be a house opened and kept "for the purpose of gaming." I agree with that view and hold that in the present case it is not necessary to show that the premises were used exclusively for the purpose of drawing a lottery. The evidence shows and it is admitted that a lottery was drawn monthly. But it must be shown that the committee kept the premises for such a purpose. The accounts and minute books show this conclusively. I have already referred to the entry concerning the engaging of clerks for sweep purposes. I would quote a few more instances: * * *

It is needless to multiply instances. I hold that the committee kept the premises for the purpose of drawing a lottery. But it is argued that on this finding the accused cannot be convicted; that they are not the committee and are only a part of it. There seems to be no substance in such an argument. It is said by Mr. Mayne in his Criminal Law of India, Edn. 2, p. 466: "Where several persons unite with a common purpose to effect any criminal object, all who assist in the accomplishment of that object are equally guilty, though some may be at a distance from the spot where the crime is committed, and ignorant of what is actually being done."

The principle is that laid down in S. 34, I. P. C., which enacts that "when a criminal Act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that Act in the same manner as if it were done by him alone." Here the criminal act alleged is "keeping an office or place for the purpose of drawing a lottery not authorized by Government" and, though learned counsel lays special stress on the word "keep" and argues that if a body of men is held to keep a place, a portion of that body cannot be said to keep it, I am unable to follow his argument. Whether the common object be the keeping of a place for the purpose of drawing a lottery not authorized by Government or the hiring of a gang of housebreakers to commit thefts, it seems to me that all who engage in such an object, are each individually guilty and that they can be prosecuted successfully in whole or in part jointly or severally. Here the five accused are shown to be five of a body of men who united together to draw and control a monthly lottery, and, if that common purpose is illegal, they are all equally and individually guilty.

(1) [1884] 13 Q. B. D. 505=53 L. J. M. C. 161=50 L. T. 808=15 Cox. C. C. 486=49 J. P. 20.

The next contention raised was, that it has not been proved by the prosecution that the lottery was not authorized by Government. The Assistant Government Advocate allows that the burden of proof lies in the first instance on the Crown to show that it was not so authorized. "Government" is defined in S. 17, I. P. C. as follows: "The word "Government" denotes the person or persons authorized by law to administer Executive Government in any part of British India." The Commissioner of Police, Mr. Tarleton, deposed that the sweep had not been authorized by Government and cross-examined said: "I say unauthorized, as result of inquiries. I mean to my knowledge there should be some record of it either in the Club or with me." From such evidence, it is clear that Mr. Tarleton has not expressly authorized it and knows of no such authorization. The fact that the Local Government has sanctioned the prosecution may also, in my opinion, be taken into consideration as tending to show that the Local Government has never sanctioned it. It is extremely improbable that the Local Government would have sanctioned the prosecution, if it had ever sanctioned the sweep, and it may be presumed that official acts are regularly performed. In my opinion it would have been an irregular act to have sanctioned this prosecution, one of the essentials of the offence being that the lottery was not authorized by Government, if in fact it had been so authorized by the Local Government itself; and in the ordinary course of business, on the Local Government considering whether this prosecution should be sanctioned or not, it was surely its duty to satisfy itself from its papers or otherwise that no such sanction at any rate by itself existed. To have sanctioned the prosecution after the Local Government had itself authorized it, would, in my opinion, have been an irregular act. I would also refer to those exhibits which display a desire for secrecy. I would especially refer to JJ. 12, which is headed: " Private and Confidential" and has at the foot of the note: "Note—this is a private communication and all recipients are earnestly requested not to post them up in any prominent place or public notice board". It is a drawing list for April 1913. There are also those exhibits that are marked. "For members only, private and confidential:" Then again there is the minute of the committee which I have already referred to where it was resolved to consult the Commissioner of Police and obtain sound legal opinion, and the notice of 8th July 1913, which stops all remuneration. If this lottery had been expressly sanctioned, as it assumed such large proportions and became so widely known, surely this would have been within the knowledge of the Commissioner of Police. If there has ever been any express sanction, it would be the simplest thing in the world for the accused to produce it or quote it.

Considering this, I think that the prosecution made out a "prima facie" case that the lottery was never expressly authorized and that it is for the accused to show that it was authorized. They do not plead that it was expressly authorized, but rely on Mr. Lucas having visited their premises to settle a dispute with reference to a lottery prize and on the Collector of Rangoon assessing them to income-tax, as proving authorization by Government. I should rather say that they relied on these facts at their trial, for they were not strongly pressed at the hearing on this reference. As regards the first incident, I am unable to say that the intervention of Mr. Lucas ever authorized the sweep. He merely went on a complaint being lodged to settle a dispute. As regards the second, it would not be within the scope of the Collector's authority to sanction a lottery. He is a revenue officer. The incident is analogous to the facts of the case of *Ramanujam Chetti* (2). Moreover, the mere act of taking income-tax from the club on the profits of the lotteries would not authorize them. Although the Assistant Government Advocate allows that in the first instance the burden of proof lies on the Crown to show that the lottery was not authorized, my learned colleague, for reasons given in his judgment, considers that the burden of proof lies on the accused persons to show that the lottery was authorized by Government. The words in the section "not authorized by Government" are equivalent to meaning "unless it (the lottery, has been authorized by Govern-

(2) 1 Weir 252.

ment" or "except in the case where it (the lottery) has been authorized by Government." It is a reasonable view, in my opinion, to take that they are in the nature of an exception, and as they appear in the section defining the offence, it is reasonable to hold that S. 105, Evidence Act, applies and that the burden of proof lies on the accused person, to show that the lottery was authorized by Government. An analogous section in the Penal Code would be S. 325 and this is provided as an illustration to S. 105, Evidence Act. I therefore agree in the opinion expressed by my learned colleague.

Though the burden of proof, in our opinion, as regards authorization, was placed wrongly, I am unable to see that the accused were in any way prejudiced in consequence, nor is it suggested that they were. They have, no doubt, brought out all facts on which they rely to prove authorization; at any rate they had full opportunity to do so.

In the result as regards the first head of charge, I am of opinion that the verdict of the jury was manifestly wrong and that all five accused were proved guilty. As regards the second head of charge, the cases of Cooke and D'Silva only are concerned. It was urged that the drawing lists contain no proposal within the meaning of S. 294-A. In my opinion they clearly do. KK-5 is the first. On the first page is set out the list of the winners drawn on 22nd May 1912. Then at the back in English and Burmese is printed amongt other matter: "The sweep for June is now open. It will close on 20th June 1912. Settling day 23rd June 1912. All tickets must be taken in the name of a member. Your name and address is registered against the number of the ticket sent you. No books are sent out and tickets must be applied for by postal money Order addressed to a member." It is unnecessary to go further into what is written. KK 5 is clearly a proposal within the meaning of S. 294-A. KK3 is to the same effect except that it refers to July drawings and the August lottery. OO is to the same effect except that it refers to the lottery drawn on 22nd May 1913, as regards the winners and to the coming lottery for June 1913. The Sangu Valley Printing Press printed many thousands of these drawing lists on the standing order of Cooke and D'Silva. In May 1912 that press printed 18,000 drawing lists, in July 1912, 32,000, and in May 1913, 33,000. There is clear evidence that a durwan used to distribute the drawing lists at the entrance to the Club premises indiscriminately to those who wanted them, that drawings were witnessed by people of all nationalities, and that the drawing lists were sent by post to those not being members of the club who requisitioned for them. The bills for the printing go into the accounts which are kept by D'Silva, the Sweep Secretary: see Ex. H. Ex. R. one of a thousand copies printed in June 1913, says that two of the men to whom money orders should be addressed are Cooke and D'Silva and the letter gives a description of the sweep and says that tickets can only be obtained on application to a member by name through postal money order. The letter bears at the bottom "President, I. T. A. Club" and so the intention was for Cooke to sign it, as he is the president of the club.

Exhibit AA is another form of letter saying to whom application should be made for tickets, Cooke and D'Silva are two of those mentioned. The evidence is, in my opinion, ample to convict Cooke and D'Silva. They were at any rate two of those who united together to publish these proposals and they clearly took a leading part in doing so. The question of sentence remains. It is urged that this is a test case, that the lottery has been allowed to run on a long time without action being taken, and that everything has been fair and above board; that certain undertakings were given in the Court of the District Magistrate with reference to the nonpublication of drawing lists and not keeping a place for the purpose of drawing the lottery; that the 20 per cent of the proceeds have been applied to benevolent purposes. I would take such arguments into consideration, except that I think that pending the disposal of this case the lottery should have been stopped altogether. But I am of opinion that the case is not one for a nominal sentence. The lotteries assumed enormous proportions monthly as shown by the evidence of Mr. Lucas. To take the figures for a few months, show-

ing the gross takings and the 20 per cent. held up and not distributed, but kept for other purposes.

Year.	Month.	Gross takings.	Twenty per cent. held up.
		Rs.	Rs.
1912...	March ...	74,000	14,800
	August ...	1,16,250	23,250
	November ...	1,43,350	26,870
1913...	January ...	1,57,221	31,441
	April ...	1,56,330	31,270
	June ...	1,82,050	36,110

The evidence shows contributors not only in Rangoon, but in the Toungoo District and Moulmein. It is probable that many other tickets were taken from many places in Burma considering the number of drawing lists distributed. I would find Albert John Cooke, George Shead, Henry Henderson, Frank John Snow, and Thomas D'Silva guilty of the offence of keeping a place for the purpose of drawing a lottery not authorized by Government and so of an offence punishable under the first part of S. 294-A, I. P. C., and would direct that they each pay a fine of Rs. 1,000 (one thousand) or that in default, they be each rigorously imprisoned for six weeks. I would also find Alfred John Cooke and Thomas D'Silva guilty under the second head of charge, namely, that on or about the 22nd May 1912, 22nd July 1912 and 22nd May 1913 they did publish proposals to pay sums on an event or contingency relative or applicable to the drawing of a ticket in a lottery not authorized by Government by publishing the lists of the winners ascertained at the drawings held on the above dates, and that they thereby committed offences punishable under the second part of S. 294-A, I. P. C. and I would direct that they do pay a fine of Rs. 5 each for each offence—one on or about 22nd May 1912, a second on or about 22nd July 1912 and a third on or about 22nd May 1913—and that in default of payment of such fines, the imprisonment be seven days simple in respect of each fine.

Ormond, J.—I agree generally with the conclusions, arrived at by my learned colleague, the Officiating Chief Judge. There can be no doubt that the club premises were kept for the purpose of drawing a lottery within the meaning of S. 294-A, I. P. C., and the only two questions that then arise relate: (i) to the proof of the fact of non-authorization of the lottery by Government; and (ii) to the liability of the accused who formed part only of the committee of the club. Although Mr. Tarleton, the Commissioner of police, does not say that if the Government had authorized the lottery, he would have known it, I think there was evidence to go to the jury for a finding that the Government had not authorized the lottery; and I think it would be a fair and legitimate inference to draw from the facts proved in the case, that the Government had not authorized the lottery. But we are asked to upset the verdict of the jury and I would prefer to decide the case upon points of law as far as possible. In my opinion under Ss. 105 and 106, Evidence Act, the onus was on the defence to show that the lottery was authorized. S. 105, Evidence Act, lays the onus on the accused of proving "the existence of circumstances bringing the case * * * * within any special exception or proviso contained * * * in any law defining the offence." Mr. McDonnell for the defence contends that this section does not apply if the proviso or exception is contained in the body of the section. He refers us to the rule of English law, which is based upon a technical difference between a proviso and an exception. The rule is stated by Lord Alverstone in *Rex* v. *James* (3) as follows: "It is not necessary for the prosecution to negative a proviso, even though the proviso be contained in the same section of the Act of Parliament creating the offence, unless the proviso is in the nature of an exception which is incorporated directly or by reference with the enacting clause, so that the enacting clause cannot be read without the qualification introduced by the exception." No reference is made in

(3) [1902] 1 K. B. D. 540=71 L. J. K. B. 211=66 J. P. 217=50 W. R. 286=86 L. T. 202=18 T. L. R. 284=20 Cox. C. C. 156.

that case to the provision contained in S. 14 of 11 and 12 Vict. Ch. 43. Apparently the rule stated above applies to trials upon indictment and not to summary proceedings before Justices.

It is unnecessary to decide if under the rule as above stated, the onus would be on the prosecution to prove non-authorization in this case. S. 105, Evidence Act, must be construed with out reference to any technical rule of English law, and if the words "not authorized by Government" are in effect a special exception or proviso contained in the law defining the offence" the onus is on the accused to prove authorization. The words "not authorized" in S. 294-A, I. P. C., mean no more and no less then "unless authorized" or "not having been authorized" or without authority; and they are clearly in the nature of an exception or proviso. S. 105, Evidence Act, which applies generally to all criminal trials, is analogous to the last part of S. 14 of 11 and 12 Vict. Cl. 43, which applies to summary proceedings before Magistrates and which runs as follows: "If the information or complaint in any such case shall negative any exemption, exception proviso or condition in the statute on which the same shall be framed, it shall not be necessary for the prosecutor or complainant in that behalf to prove such negative, but the defendant may prove the affirmative thereof in his defence, if he would have advantage of the same. In prosecutions under the old game laws, which made certain acts offences, unless the accused had certain qualifications, it was not necessary for the prosecution to prove the absence of such qualifications. So, too, in an action for a penalty under 55 Geo. 3 C. 194, S. 20 for practising as an apothecary without having obtained a certificate of qualification it was held that the onus lay on the defendant to show that he had obtained a certificate and that it was not necessary for the plaintiff to prove the negative. *Apothecaries Co.* v. *Warburton* (4).

Illustration (b) to S. 106, Evidence Act, is as follows: "*A* is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him." I see no difference in principle between that case and the present one. In my opinion, the onus was on the defence to show that the lottery had been authorized. It is not suggested that the accused were prejudiced in their defence by the prosecution having assumed the burden of proving the absence of authority. It is contended for the defence that the lottery must be taken to have been authorized by Government, because it had been going on for so long and the profits derived by the Club from the lottery had been assessed to income-tax; but this clearly does not amount to authorization.

Then as to the liability of the accused the Club premises were, undoubtedly, "kept" for the purpose of drawing the lottery; the Committee had the control and management of the Club premises; the five accused were active members of the Committee and it was under the directions of all five that the place was kept for the purpose of drawing the lottery. The fact that others may have jointly kept the place with them would not prevent these accused from being directly liable as principals as to the act of "keeping".

In all other respects I concur with the judgment and proposed order of my learned colleague.

We were told by Mr. McDonnell that the lotteries have not been stopped; but that lists are not published and that the lotteries are not drawn in the same place more than once. Reliance apparently is placed upon the judgment of *Martin* v. *Benjamin* (5), which was a case cited by the prosecution. I do not wish it to be understood that I accept this to be good law that a person who habitually holds a lottery does not commit the offence of keeping a place for the purpose of drawing a lottery, simply because he has a different place on each occasion. The above case, in my opinion, is not an authority for such a proposition.

K.N./R.K. *Accused convicted.*

(4) 2 B. & Ald 40=106 E. R. 578.

(5) [1907] 1 K. B. D. 64=76 L. J. K. B. 81=96 L. T. 197=71 J. P. 30=23 T. L. R. 53=51 S. J. 50.

A. I. R. 1914 Lower Burma 30

TWOMEY, J.

Ismail—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1188 of 1914, Decided on 30th July 1914, from order of the Subdivisional Magistrate, Kawkareik, D/- 27th March 1914.

(a) Penal Code (45 of 1860), S. 199—Declaration referred in S. 199 must be one receivable in evidence of facts declared.

The declaration contemplated in S. 199 is a statement of facts in the form simply of a declaration which, for the purpose of proof of the fact declared to, has by itself all the legal force of evidence given on oath or solemn affirmation, that is to say, it must be a declaration which having been made is afterwards receivable as evidence of the fact declared. [P 30 C 2]

(b) Penal Code (45 of 1860), Ss. 182, 199, 177 and 193—False report to revenue officer for getting name entered is punishable under S. 182 only.

By reporting falsely that his father had died the petitioner induced the revenue surveyor to enter his name in the revenue registers as owner of certain gardens and paddy lands in succession to his father.

Held: that the petitioner had not committed an offence under S. 199, 177 or 193, but that he had committed an offence under S. 182. [P 30 C 2]

(c) Criminal P. C. (5 of 1898), Ss. 439, 195, and 537—In revision on conviction of offence not requiring sanction, conviction cannot be changed to one under offence requiring it.

A conviction under S. 199, Penal Code, in respect of which no sanction is necessary, cannot be converted in revision to a conviction under S. 182 in respect of which a sanction is necessary, especially where the attention of the trying Magistrate was drawn to the necessity of such sanction. [P 31 C 1]

Judgment.—The applicant has been convicted of two offences under S. 199, I. P. C., and has been sentenced to suffer rigorous imprisonment for a year.

The allegation against him is that he went to the revenue surveyer on two occasions and by reporting falsely that his father had died induced the revenue surveyor to enter his name in the revenue registers as owner of certain gardens and paddy lands in succession to his father. The accused denied having reported that his father was dead. But the Subdivisional Magistrate found that he had done so and the Sessions Court on appeal came to the same conclusion.

Apart from the defence on the facts, it was argued both before the Subdivisional Magistrate and the Sessions Court that the facts alleged by the prosecution do not constitute offences under S. 199, I. P. C., and I think it is clear that they do not. The declaration contemplated in S. 199, as explained in the Madras case of *A. Vedamutu* (1), is a statement of fact in the form simply of a declaration which, for the purpose of proof of the fact declared to, has by itself all the legal force of evidence given on oath or solemn affirmation. It must be a declaration which having been made is afterwards receivable as evidence of the fact declared. But neither the report made by the accused as to the alienation of land nor the revenue surveyor's written record of the report is receivable in evidence as proof of the facts stated in the report. Examples of the kind of declarations contemplated in S. 199 are affidavits in civil suits, statutory certificates under S. 2, Bankers' Books Evidence Act, and declarations and certificates under the Special Marriage Act, 1872. The learned Sessions Judge thought that the report made by the accused being a report which he was bound to make uader S. 22-A, Land and Revenue Act, was necessarily a declaration within the meaning of S. 199, I. P. C. But the mere fact that a party to an alienation is bound to report it does not make the record of the report "receivable" as evidence of any fact which is an essential factor in S. 199. It may be doubted also whether the word "alienation" in S. 22-A, Land aud Revenue Act, if strictly interpreted would cover a case of succession or inheritance. As it is clear that the alleged false information or the record of it made by the revenue surveyor is not a false declaration under S. 199, it is necessary to consider whether the facts alleged by the prosecution amount to offences under any other section of the Code. They do not amount to an offence under S. 177 because the accused's father being still alive, there was no information which the accused was "legally bound to furnish." Ss. 191 and 193 would be applicable only if the accused was bound by an oath or by an express provision of law to state the truth in making his report to the revenue surveyor. He would have been bound by an express provision of law if the revenue surveyor were a revenue officer for the purposes of S. 54-B, Land and revenue Act. But notification B on p. 77, Land and Revenue Manual, shows that revenue

(1) [1868] 4 M. H. C. R. 185=1 Weir 159.

surveyors have not been appointed revenue officers for purpose of S, 54-B. It is clear that a township officer is the lowest revenue officer before whom an applicant or other person appearing in a revenue matter is bound to state the truth under that section and there is no other express provision of law which binds a person to state the truth before a revenue surveyor. There remains however S. 182, the offence of giving false information to a public servant with intent that he shall use his lawful power to the injury of another person." On the facts alleged by the prosecution it may be contended that the accused has committed offences under S. 182. But for a private prosecutiou under S. 182, the sanctiou of the revenue surveyor's superior officer (the Superintendent of Land Records or the Deputy Commissioner) would be necessary under S. 195, Criminal P. C. S. 537, Criminal P. C., provides that no conviction shall be set aside merely for want of sanction under S. 195. But it would be going much further than this to pass orders in revision converting convictions under S. 199, I. P. C., in respect of which no sanction is necessary, to convictions under a section in respect of which sanction would be necessary, especially as the attention of the Magistrate who tried the case was drawn to the necessity of such sanction.

Moreover, the case is one in which it is expedient to apply the provisions of S. 195, Criminal P. C., strictly. There are features in it—I refer particularly to the numerous erasures and corrections in the exhibits—which render it desirable that the superior revenue officers should exercise their judgment before a charge is laid under S. 182, I. P. C. The convictions and sentences are set aside and the applicant is acquitted of charges under S. 199, I. P. C. The Subdivisional Magistrate can submit the records to the Deputy Commissioner to whom it will be open to lay a complaint under S. 182, I. P. C., or to sanction an application to prosecute nnder that section, as he may think fit.

K.N./R.K. *Conviction set aside.*

K. N. DAR, B. A. LL. B.
Vakil High Court,
SRINAGAR (Kashmir)

A. I. R. 1914 Lower Burma 31

TWOMEY, J.

Ah Yway and *another*—Appellants.

v.

Ma Gyi—Respondent.

Criminal Revn. Appln. No. 87-B of 1913, Decided on 26th June 1913, from the review of the order of Eastern Subdivisional Magistrate, Rangoon, D/- 2nd April 1913.

Criminal P. C. (5 of 1898), Ss. 133 and 138—Bona fide claim of private property must be decided by Magistrate and cannot be left to jury—Question must be raised before jury is appointed—Jury's verdict does not bar civil suit to establish private right.

Obiter.

Where a conditional order is passed under S. 133, and the person against whom the order is made raises a bona fide claim that the subject of contention is private property the Magistrate is bound to investigate the claim and cannot leave it to a jury appointed under S. 138. But when a jury has once been appointed it is not open to the person, against whom the order is made under S. 133, to set up such a claim and to have it determined by the Magistrate before the jury proceeds with the matter: 15 *Cal.* 564, *Foll.* [P 31 C 2]

Obiter.—If the jury decided that the order was reasonable and proper the appellant would not be estopped from bringing a civil suit to establish his right to exclusive enjoyment of the land: 6 *Cal.* 291, *Ref.* [P 32 C p]

Lentaigne—for Appellants.

Maung Kin—for Respondent.

Order.—The rulings cited by the learned advocate for the applicant show conclusively that where a conditional order is passed under S. 133, Criminal P. C., and the person against whom the order is directed raises a bona fide claim that the subject of contention is private property, the Magistrate is bound to investigate the claim and if he finds it established to stop further proceedings. Where such a claim is raised the Magistrate cannot leave it for decision to a jury appointed under S. 138.

But in the pressnt case the applicant made no such claim when he appeared to answer the conditional order. The order was issued on 2nd December 1912 and the applicant's advocate applied to the Magistrate on 19th December to appoint a jury under S. 135. It was not till 2nd April 1913 when the jury had been constituted and were ready to go into the matter in dispute that the advocate raised this point, and asked the Magistrate to go into the question of title to the land over which a public right of way is claimed. I think that it was

then too late. This view is supported by the following passage in *Luckhee Narain Banerji* v. *Ram Kumar Mukherji* (1): "The rule however that a bona fide claim of title ought not to be determined in summary proceeding before the Magistrate is subject to this, that the objection must be raised by the defendant at or before the hearing; he cannot be heard afterwards to object to the result of proceedings to which he has deliberately submitted himself." I can find no authority in any of the cited rulings for holding that once a jury is appointed on the application of the person against whom an order under S. 133 has been made, it is open to him at a later stage to set up a claim of right to the subject of contention and to have this claim determined by the Magistrate before the jury proceed with the matter.

It appears to me that there is no alternative now but to let the jury try the issue whether the Magistrate's order under S. 133 is reasonable and proper.

In my note however that if the jury should decide that the order is reasonable and proper and the Magistrate should then make the order absolute, the applicant will apparently not be estopped thereby from bringing a civil suit to establish any right he may claim to the exclusive enjoyment of the land: see *Muttyram Sahoo* v. *Mohi Lall Roy* (2).

The application is dismissed.

K.N./R.K. *Application dismissed.*

(1) [1888] 15 Cal. 564.
(2) [1881] 6 Cal. 291.

A. I. R. 1914 Lower Burma 32

PARLETT, J.

Gaggeero Franeesco—Plaintiff—Appellant.

v.

L. P. R. Chetty Firm—Defendants—Respondents.

Special First Appeal No. 21 of 1913, Decided on 7th May 1914.

Paper Currency Act (2 of 1910), S. 26—Agreement to return deposit on production of receipt for deposit— Whether receipt could be engagement within S. 26 is doubtful.

According to the terms of a deposit receipt issued by a private banker, the deposit money was repayable on the production of the receipt. The receipt being stolen from the depositor, was presented to the banker by a cooly who, according to the banker, was paid the whole of the money due under it without any inquiry as to how he came by the receipt:

Held: on depositor suing the banker for recovery of his money that even if the banker paid anything to that cooly who produced the receipt, it was not in the bona fide belief that the cooly was authorized by the depositor to receive it. [P 33 C 2]

Doubted whether the receipt in question could be held to be an engagement for the payment of money within the meaning of S. 26, Paper Currency Act. [P 32 C 2]

P. N. Chari—for Appellant.

Auzam—for Respondents.

Judgment.—Appellant sued the respondent Chetty firm for Rs. 1,702-11-0, balance of principal and interest due to him on a deposit account with the respondents. On 20th December 1911 he had Rs. 500 on depoeit and on that day he deposited Rs. 1,000 more receiving a receipt in Tamil for Rs. 1,500 bearing interest at the rate of ½ per cent per mensem. The last sentence of the receipt according to the translation runs as follows: "Whoever brings this will be given the principal and interest and this receipt will be taken by us." There were credits of Rs. 250 and Rs. 350 on 29th February and 28th April 1912 and debits of Rs. 300 and Rs. 200 on 7th and 18th October. On 24th October 1912 there was due Rs. 1,694-6-0, principal and interest. The defendants alleged that on that date they paid this sum to one Mahalutchumi in accordance with the terms of the receipt and also believing on sufficient grounds and in good faith that Mahalutchumi was authorized by plaintiff to receive the money.

The Small Cause Court has found on both points in defendant's favour and has dismissed the suit with costs. Plaintiff now appeals. The first point taken is that the receipt in question infringes S. 26, Paper Currency Act, 1910, and being a contract forbidden by law cannot be relied upon as a defence. That section enacts that "no person in British India shall draw, accept, make or issue any bill of exchange, hundi, promissory note or engagement for the payment of money payable to bearer on demand." The marginal note against this section describes it as the "prohibition of issue of private bills or notes payable to the bearer on demand" and I doubt whether the receipt now in question can be held to be an engagement for the payment of money within the meaning of that section. I will

therefore consider the other aspects of the defence. First it is alleged that the defendants made the payment to Mahalutchumi in terms of their contract with the plaintiff and in accordance with the conditions on which they accepted the deposit. I am inclined to doubt even whether they meant to convey any more by the words used in the receipt than is conveyed by the words, "re-payable here on production of this receipt", the usual formula appearing on deposit-receipts granted by European banks.

But even if they did so I have no doubt that plaintiff never understood or agreed that defendants could pay the whole of his deposit to any person who produced his receipt without any inquiry as to how he came by it. The defendants are at pains, therefore to plead that they explained these terms to him and he accepted them. Annamale, the agent, in his evidence states that he translated the receipt in Hindustani to the plaintiff. Achalingam, the clerk, says the plaintiff said that if he wanted to deposit or withdraw money he would send his man for the purpose, which would show that even if he said so at all he never intended the money to be paid to anyone but his authorized messenger. The plaintiff denies that the receipt was read to him. Even if it was there is nothing to show how much Hindustani the Chetty knew and how much of the Chetty's Hindustani plaintiff could understand. He says that in May 1912 he showed the receipt to a Chetty who told him what it contained ; but of one thing I feel certain and that is that at no time did he grasp the fact that the Chetty was entitled to show all his money to anyone who merely produced this receipt. I am satisfied that he and the Chetty never did agree upon the meaning of that receipt in that sense. The defendant further attempted to prove that he had reasonable grounds for believing that Mahalutchumi was authorized by the plaintiff to draw the money and that he paid it to him in good faith.

Mahalutchumi is a cooly under a maistry who worked for plaintiff. Plaintiff gave him the key of his house to hand it over to his head maistry when he went to Insein, and in his absence Mahalutchumi's brother opened his box and took this receipt and presented it to the defendants. Defendants' case is that Mahalutchumi came with plaintiff when he made his deposit on 20th December 1911, and also that he, Mahalutchumi alone, drew and deposited with the firm subsequent sums. There is only Achalingam's word as to the firm's latter transactions. The plaintiff denied that Mahalutchumi ever went with him and was sent by him to the defendants. He calls Moodaliar who, he says, accompanied him, when he deposited the Rs. 1,000 and says that he made all subsequent deposits and withdrawals himself as one would certainly expect. I see no reason to prefer defendants' story to plaintiff's on the point ; it will appear to me in the highest degree improbable that plaintiff would trust a cooly not even directly under him, with large sums of money in the manner alleged. If he had done so there seems little doubt in the light of subsequent events that Mahalutchumi's honesty would not have been proof against the temptation. But these are additional reasons for disbelieving defendants' story. Admittedly the then agent Chinnaya sent Achalingam off with Mahalutchumi to see the plaintiff. Achalingam says it was because Chinnaya did not know of plaintiff's order to pay his man, but when reminded that he himself knew of it and could have reassured Chinnaya, he says it was in order to explain to plaintiff how the interest was calculated. This is what Chinnaya says. It is admittedly an unusual thing to do in such cases. One Singaram Pillay who was said to have been present and lent Rs. 700 to defendants to make up the Rs. 7,600 has not been called. I feel little doubt that if defendants paid Mahalutchumi anything at all, it was much less than Rs. 1,694 and that they were only ready to do that on the understanding that he accompanied one of them to the plaintiff to ascertain that he had indeed been sent by him. On the way Mahalutchumi disappeared and having the receipt in their hands it was easy for defendants to allege that they have paid him in full. I doubt if they paid him anything, but if they did it was not in the bona fide belief that Mahalutchumi was authorized by plaintiff to receive it.

The decree of the lower Courts is reversed and the plaintiff is granted a de-

cree as prayed for with costs in both Courts.

K.N./R.K. *Decree reversed.*

A. I. R. 1914 Lower Burma 34

PARLETT, J.

C. H. Browne—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 123 of 1913, Decided on 13th March 1913, from decision of Dist. Magistrate, Rangoon.

Criminal P. C. (5 of 1898), S. 297—When ingredients of offence not explained summing up to jury is wrong and verdict cannot stand.

Where the accused was tried for criminal breach of trust by a District Magistrate with the aid of a jury and in summing up the District Magistrate did not expressly tell the jury that the test they were to apply was whether the circumstances relied upon by the accused showed an intention of causing "wrongful gain" or "wrongful loss" nor were they told what those terms meant:

Held: that there had not been sufficient compliance with S. 297 and that the verdict could not stand. [P 35 C 2]

Patker and *Glaville*—for Appellant.

Government Advocate—for the Crown.

Judgment.—Appellant was tried as a European British subject by the District Magistrate, Rangoon, and a jury and convicted under S. 409, I. P. C., and sentenced to nine months' rigorous imprisonment. That sentence exceeds the Magistrate's powers under S. 446, Criminal P. C., and cannot be confirmed. Appellant however appeals on various grounds aud those which were urged at the hearing might be summarized as follows:

1. It was urged that the charge itself was defective in that it stated that accused "criminally misappropriated" the money entrusted to him and that it did not state that it was done "dishonestly." No doubt, the correct form of the charge in view of S. 221 (2) Criminal P. C., would have been that accused being entrusted with money in the way of his business committed criminal breach of trust in respect of that money. But it is obvious not only that any objection to the wording could and should have been raised at the commencement of the trial, but also that the charge as framed did give the accused notice of the matter with which he was charged. Counsel naturally never ventured to suggest the contrary; indeed in his reply he withdrew the argument.

2. It was argued that there was misdirection to the jury in that the Magistrate told them that the facts were not in dispute, whereas certain of them were; that the Magistrate had decided certain questions of fact instead of leaving them to the jury and that he expresed his opinion upon others without telling the jury that they were not bound by such opinion. The charge must be read as a whole and in relation to the circumstances of the case. Appellant as an auctioneer received articles to sell on behalf of the complainant and did sell some and receive payments to the extent of Rs. 2,296-9-9 for them in March 1912. This amount less certain sums due to him for commission, etc., was due to be paid to complainant within three months. At the end of that time demand was made and appellant expressed himself unable to pay. Subsequent demands were also made unsuccessfully and complainant would have been willing to grant further time for payment, if appellant could furnish a guarantor. These facts are admitted. It is urged that the contract between the parties did not create a trust, that the facts, as to what that contract was were in dispute and should have been left to the jury to decide, whereas the Magistrate held that the existence of a trust was established.

It appears that it is customary here for auctioneers to have to pay up the value of goods sold for their clients within one month of the sale. It is urged that the fixing of the time in this case at three months, no interest being charged on the sum due, together with the offer to grant further time if a guarantor were furnished are facts bearing on the decision of the point whether the contract between the parties was the usual one between auctioneer and clients, and the decision should have been left to the jury; or, at any rate, that the willingness to grant time on guarantee points to a fresh contract made after the three months expired, and that whether thereunder relationship of trust was retained was a question for the jury.

It cannot be gainsaid that the ordinary relationship between auctioneer and client is one of trustee and cestui que trust, both as regards the goods made over by the latter to the former to sell for him and also as regards the money produced by the sale and received

by the auctioneer: *Crowther* v. *Elgood*. (1). What the Magistrate, in effect, told the jury was that the admitted facts as to the original transaction between the parties, would constitute a trust; but that appellant relied upon further facts as pointing to special conditions entered into between the parties in consequence of which appellant did not hold the sale proceeds, as the money of the complainant, and he left the question of the existence of such special conditions and the inference to be drawn from them to the jury. In this I am unable to hold that there was misdirection. No doubt, it is desirable to remind the jury that they were the sole judges of fact and that any expression of opinion by the Judge upon the facts is not binding upon them. But in this case I am of opinion that the questions of facts, which should properly have been left to the jury, were, in fact, expressly so left.

3. Some alleged minor errors in the charge to the jury have been referred to, viz. that certain arguments used by the prosecuting counsel were attributed to the defence. It is not however suggested that they were erroneous nor that their being attributed to the wrong side has, in fact, occasioned a failure of justice, without being satisfied as to which an appellate Court is prohibited from interfering.

4. Lastly, it is argued that S. 297, Criminal P. C. was not complied with, in that the Magistrate did not sufficiently lay down the law by which the jury were to be guided. It appears that the laying down of the law consisted merely in reading out Ss. 405 and 409, I. P. C. It is urged that this was an insufficient explanation of constituents of the offence, reliance being placed on *Briscoe Birch, J. S.* v. *Emperor* (2) and also *Taju Pramanik* v. *Queen-Empress* (3) and *Mari Valayan* v. *Emperor* (4), and in particular that the jury were not told the meaning assigned in the Indian Penal Code to the words "dishonestly," which, as in the first case cited above, is an essential part of the definition of the offence. It can hardly be necessary in every instance when laying down the law to go back to absolutely first principles and give the definition of every expression used in the section dealing with the offence. To do so might savour of an insult to the intelligence of the jury. For instance, I doubt whether Judges often, if ever, tell the jury that the word "death," in Ss. 299 and 300, I. P. C., denotes the death of a human being. Similarly in a simple case of theft, where a pickpocket steals a man's watch and runs away with it and the defence is one of mistaken identity, the omission to define "dishonestly" might well be held not to be misdirection which had in fact caused a miscarriage of justice. But, though in many cases the popular meaning of the word and that assigned to it in the Indian Penal Code coincided, there were certainly instances in which they did not. Men's standards of honesty and straightforwardness differ, and so consequently do their opinions of other persons' conduct. Instances are common of transactions, which are discreditable, dishonourable, even fraudulent, but which nevertheless fall short of being dishonest within the definition of that term as given in the Indian Penal Code.

In the present instance, there were circumstances which bore upon the question as to whether appellant's action was or was not dishonest within that definition, and though I think the attention of the jury was called to most, if not all, of them in the course of the summing up, yet they were not expressly told that the test they were to apply was whether those circumstances showed an intention of causing wrongful gain or wrongful loss, nor were they told what those terms meant. It may be that they thought appellant untrustworthy in business matters, that his conduct in not paying complainant as soon as he received the money was discreditable or even dishonourable; but it is impossible to say that they considered the facts in the light of the definition and came to the finding that he acted with the intention of causing wrongful loss or wrongful gain, and I am therefore constrained to hold that there had not been a sufficient compliance with S. 297, Criminal P. C., and that the verdict cannot stand. The finding and sentence

(1) [1887] 34 Ch. D. 691=56 L. J. Ch. 416=56 L. T. 415=35 W. R. 369.
(2) [1910] 5 I. C. 981=5 L. B. R. 149; 11 Cr. L. J. 340.
(3) [1898] 25 Cal. 711=2 C. W. N. 369.
(4) [1907] 30 Mad. 44=1 M. L. T. 399=5 Cr. L. J. 78.

are reversed; and appellant will be committed for trial. Bail in Rs. 3,000 with two sureties jointly and severally in that sum may be accepted.

K.N./R.K. *Appeal accepted.*

A. I. R. 1914 Lower Burma 36

HARTNOLL, OFFG. C. J. AND ORMOND, J.

Maung Tha Kado—Appellant.

v.

Ma Thin Myaing—Respondent.

First Appeal No. 142 of 1911, Decided on 16th February 1914.

Buddhist Law (Burmese)—Husband and wife — Dissolution — Separation for six years—Unsuccessful attempt by both to obtain divorce—Husband taking another wife 17 months after separation—Facts held to satisfy conditions of Manugye, S. 17, Ch. 5.

Where the wife left her husband and lived separate from him for a period of six years, and where in the meantime the wife sought a divorce from the husband for cruelty and the husband from the wife for adultery but no divorce was granted, and where 17 months after separation the husband took a second wife:

Held: on a consideration of the facts, that the conditions contemplated by S. 17, Ch. 5 of the Manugye for the dissolution of a marriage became complete. [P 37 C 1]

Dhar—for Appellant.

Bomanji—for Respondent.

Ormond, J.—Ma Thin Myaing claims to be the adopted daughter of the deceased Ma Saung and the first matter to be decided is whether she has proved that she was. The learned Judge on the original side has found that she has proved the relationship which she alleges and on a perusal of the evidence I agree with this decision. There is no good reason to disbelieve U Tha Shwe, who was a very close neighbour of Ma Saung up to the time of her death. He says that he knows Ma Thin Myaing was Ma Saung's adopted daughter by repute and because Ma Saung told him so. From his evidence it is clear Ma Thin Myaing lived with Ma Saung before her marriage, and that she was married from Ma Saung's house. Mg. Tha Kado does not deny knowing of Ma Thin Myaing's existence. Why should Ma Saung have taken Ma Thin Myaing into her house and supported her and according to U Tha Shwe and Ma Thin Myaing in the life time of her father?

There seems no reason to disbelieve Ma Thin Myaing in this statement of hers. Maung Ba Than, who says he is a clerk in the employ of the Burma Railways and so prima facie a respectable man, says that he once lived in Ma Saung's house and that the latter told him she had an adopted daughter at Tavoy. There is no reason to disbelieve this man. Ma Kyin Tha says that Ma Saung told her that Ma Thin Myaing was her daughter and treated her as such. She is a paddy trader and there is no good reason to disbelieve her. Maung Aung Myat, who says that he is a saw-pit owner, says that about 1908, Ma Saung said she had adopted a daughter. Maung Tha Kado has not met Ma Thin Myaing's case satisfactorily and no desertion by Ma Thin Myaing is proved. Her son-in-law, who was also Ma Saung's nephew, was with Ma Saung at her death, and according to U Tha Shwe her daughter used to live with Ma Saung. I consider Ma Thin Myaing's adoption established.

The next point for decision is whether the status of husband and wife existed between Ma Saung and Maung Tha Kado at the time of Ma Saung's death. They were married in 1896. In June 1903 Ma Saung left the house where she and Maung Tha Kado lived together, and sued him for divorce on the ground of cruelty. She failed to obtain a divorce. As she never returned to him, she must be taken to have deserted him in June 1903. She died in November 1909, and so the parties remained separate for some six years. But according to the Full Bench ruling of this Court *Thein Pe* v. *U Pet* (1), desertion of the husband by the wife for one year does not ipso facto and without any further and expressed act of volition on the part of either party to the marriage dissolve the marriage tie. Have there in this case been any acts of volition dissolving it? In December 1903, Maung Tha Kado sued Ma Saung for divorce on the ground of adultery. This was six months after her desertion of him. He may have been trying to get hold of her property by bringing such a suit, but in any case it shows that he wanted to divorce her. No divorce was granted as he was found not to have proved his case. In February 1905, he sued Ma Saung for restitution of conjugal rights and lost his case. He may in such suit have been actuated by a desire to get hold of her property and

(1) [1905] 3 L. B. R. 175 (F.B.).

not by a desire to again cohabit with her, for he in that case allowed he had taken a temporary wife, one Ma Eik, and that he had been living with her for some twelve months. He made this statement on 15th November 1905. So that would indicate that he took Ma Eik about November 1904 or about seventeen months after Ma Saung deserted him at any rate after the expiration of the year of desertion laid down by the Dhammathat. He endeavoured to make out in 1905 that Ma Eik was not his wife. In the present case he allowed that Ma Eik was his wife. This was in August 1911.

He clearly took Ma Eik as his wife from the beginning and the taking of her as such was clearly an act of volition by him as indicating that he did not desire Ma Saung any longer, and that he finally severed the marriage tie between them by doing so. The whole of the conditions contemplated by S. 17, Ch. 5 of the Manugye for the dissolution of the marriage became complete. Ma Saung left his house. She did not return within the year. It is not shown that he maintained her in any manner after she left. Before he took Ma Eik as his wife he did not claim Ma Saung as such. On the contrary he tried to divorce her. He had the right to separate and marry again and he finally severed the tie between them by doing so. The fact that he sued Ma Saung for restitution of conjugal rights after taking Ma Eik seems to me not to affect the matter. Apart from the probability that he was then merely endeavouring to get hold of Ma Saung's property and that he had no intention of again cohabiting with her or treating her as a wife, she was no longer his wife for the reasons which I have set out above. It is true that Ma Saung did not defend the suit for restitution of conjugal rights on the ground that she was no longer the wife of Maung Tha Kado, but that she defended it on other grounds, which show, as far as she was concerned a fixed determination not to resume conjugal relations; but, in my opinion, it was open to her to make such a defence and the argument can clearly be raised and considered in this case where the contest is between those left behind by Ma Saung as to who is entitled to inherit her property and where it is necessary to determine the legal status of each party to her. All facts showing what the status was must receive consideration. In my opinion at the time of Ma Saung's death there was no tie of marriage existing between her and Maung Tha Kado.

The second ground of appeal has manifestly no substance in it.

I would dismiss this appeal with costs.

Hartnoll, Offg, C. J.—I concur.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Lower Burma 37

TWOMEY AND PARLETT, JJ.

A. T. K. P. L. Muthia Chetty and *others* —Appellants.

v.

I. A. R. Arunachallam Chetty and *another*—Respondents.

Misc. Appeal No. 38 of 1913, Decided on 10th September 1913.

Civil P. C. (14 of 1882), S. 20—Though S. 20 is omitted from new Code very strong reasons must be shown to deprive plaintiff of his right to choose his forum.

Though S. 20 of the old Civil P. C., which required that a Court must be satisfied that justice is more likely to be done by the suit being instituted in some other Court before it requires the plaintiff to do so, is dropped in the new Code and the Court's discretion is thus left unfettered, very strong reasons must be shown under the new, as required in the old Code for depriving a plaintiff of the right to bring his suit in any Court in which the law allows : 13 *Bom.* 178 ; 5 *All.* 60 ; 9 *Cal.* 980 and *Church* v. *Barnett*, (1871) 6 *C.P.* 116, *Foll.* [P 39 C 1, 2]

Giles—for Appellants.

N. M. Cowàjee and *A. B. Banerji*—for Respondents.

Parlett, J.—L. A. R. Arunachallam of Rangoon filed two suits for dissolution of partnership in the District Court of Bassein. In one case the alleged partnership business was carried on at Ngathaingyaung and there were ten partners; in the other it was carried on at Athok and there were five partners; all of them however were also partners in the Ngathaingyaung firm. Eight of the defendants in the Ngathaingyaung suit and four of those in the Athok suit desire the suits to be tried at Sivagunga in the Madras Presidency and have filed applications under S. 22, Civil P. C., asking this Court to determine in which Court the suit shall proceed. Subramanian Chetty, defendant 2 in each of the suits, desires the hearing to be in Bassein, and

he is respondent 2 in these applications. It will be convenient and sufficient to deal with the Ngathaingyaung suit only, as the remarks made on that case apply, so far as may be, to the Athok suit, and nothing has been said which applies only to the latter suit. Valliyama Achi, defendant 5 and petitioner 4 originally filed an affidavit supporting the application, but she has now withdrawn it and desires the case to proceed in Bassein. The other seven defendants have filed affidavits in practically identical terms, that of petitioner 1 and defendant Muthiya Chetty however containing some additional matter and it alone therefore need be referred to.

The petition sets out that the alleged partnership was dissolved at Sirugudalpatti by mutual consent about 1909 and that thereafter seven of the original partners, being also seven of the defendants, together with three fresh persons formed a new partnership with which the plaintiff has not and never had anything to do, that the main issue in the suit is whether there was a dissolution of partnership at Sirugudalpatti, and that the suit has been purposely instituted in Bassein with a view to prevent it being fairly and properly tried, that all the defendants reside at Sirugudalpatti ; that all the account books of the partnership are there ; that the members of the new firm, the agents, who can speak to the account books, and the agents of the dissolved firm during its subsistence are there, and as these latter persons are no longer in petitioner's employ their attendance at Bassein cannot be produced; that all the evidence necessary for the determination of the suit is at Sirugudalpatti, and that a hearing at Sivaganga will be less expensive, and more convenient and expeditious than a hearing at Bassein. These statements are repeated in all petitioner's affidavits, and Muthiya further alleges that the suit is wholly vexatious and instituted at the instance of Subramanian, defendant 2 and respondent 2. This the plaintiff, respondent 1, denies in the affidavit and respondent 2, who has the books of the partnership sought to be dissolved except those in current use, is prepared to produce them in Bassein whenever required to do so. The plaintiff in his affidavit denies that the plea of dissolution, for which no definite date is alleged by petitioner, is a bona fide one, and he files letters written to him by Karuppan, one of the defendants, from Ngathaingyaung on 1st December 1909 and 18th January 1910 indicating that the dissolution had not taken place then and also a copy of a letter written by himself to Muthiya on 29th December 1911 indicating the same, of which letter the first acknowledgment was a telegram not sent till 17th January 1912, and no detailed reply was sent till 1st April 1912. Plaintiff asserts that this belated answer, to which he instructed his advocates to reply at once, was the first intimation he had of the alleged dissolution. He points out the delay and expense, which in the event of a preliminary decree for dissolution being passed by a Court in the Madras Presidency, would be entailed over the realization of the assets and winding-up of the business by that Court in the Bassein District, where the assets are situated: and further that the account books of the business cannot be sent from Ngathaingyaung and Athok to India without dislocating the business, whereas there is no difficulty about bringing the old books from India to Bassein. He also alleges that a former agent of the Athok firm is now at Athok and a former assistant of the Nagathaingyaung agent is now manager at Nagathaingyaung, while defendant 1 and petitioner himself has firms in Rangoon, Ngathaingyaung and Athok. He states that a large portion of the evidence in support of his case is in Burma and not, as the petitioners allege, in Sirugudalpatti; and that it will be impossible for himself to leave Burma without breaking agreements with his own employers and partners, thereby entailing heavy monetary losses on the former, damage to his own reputation, and dismissal of his son from a lucrative appointment. He also files a letter purporting to come from Muthurasappa, one of the petitioners, dated 2nd July 1913, expressing his willingness to come to Burma as soon as the fates are propitious.

In England it has been repeatedly held that the venue will not be changed from the place where the plaintiff has laid it unless it be shown that there will be a manifest preponderance of convenience in trying the cause else-

where. *Church* v. *Barnett* (1), *Helliwell* v. *Hobson* (2) and *Durie* v. *Hopwood* (3), while in *Blackman* v. *Bainton* (4), 25 witnesses and a horse on one side against ten witnesses on the other were held not such a preponderance of inconvenience as to induce the Court to bring back the venue from the place where the cause of action, if any, arose. Similar principles have been followed in India.

Geffert v. *Ruckchund Mohla* (5) was a suit for defamation filed in Bombay, the defendant having previously sued for damages for wrongful dismissal in Wardha, and the defendant applied for the defamation case to be tried in Wardha. The learned Judge said: "We find it laid down in Cl. 2, S. 20, that the Court may make such an order as is now asked for if it is satisfied that justice is more likely to be done by the suit being instituted in some other Court. It would, no doubt, be much more convenient to the defendant to have the case against him tried at Wardha. Nearly all his evidence and probably a large portion of the plaintiff's evidence is only obtainable there. But is that a ground for depriving the plaintiff of his right to bring his suit in this Court? The injury and damage of which he complains have been inflicted in Bombay, and many of his witnesses (he says) are resident here. He desires to vindicate his character in the place where he alleges it has been defamed. I can find no authority for preventing him doing so. I am not satisfied (to use the words of the section) that justice is more likely to be done at Wardha or elsewhere than in this Court." The present Code omits S. 20 of the Code of 1882 which required that the Court must be satisfied that justice was more likely to be done by the suit being instituted in some other Court, but though it leaves unfettered the Court's discretion to determine in which Court the suit shall proceed strong reasons must certainly be shown under the new as were required under the old Code for depriving a plaintiff of the right to bring his suit in any Court which the law allows. In *Tula Ram* v. *Harjiwan Das* (6) the defendants in a suit instituted at Mainpuri applied under S. 24, Civil P. C., 1882, that the suit might be tried at Surat on the ground that it would be tried with greater convenience to them at that place, it was held that there being no balance in favour of either justice or convenience on the side of the Surat Court the suit should proceed at Mainpuri.

The Court said: "We next have to see whether the defendants, applicants, have made out a case to justify us in closing the doors of the Court of the Subordinate Judge of Mainpuri to the plaintiffs and leaving them to seek their remedy in another jurisdiction. We do not think that they have, or that any sufficient cause has been shown for depriving the plaintiffs of the right given them by law to select in which of the Courts they will carry on their suit." In *Khatija Bibi* v. *Taruk Chunder Dutt* (7) it was held that parties desirous of obtaining the transfer of a case from one forum to another should satisfy the Court that either on account of expense or convenience or otherwise the place of trial ought to be changed. In the course of the judgment it was said: "Prima facie, the plaintiff as the arbiter litis has a right to bring his suit in any Court which the law allows; and S. 23 is only intended, as we consider, to provide for those cases, where, on the ground of expense or convenience, or some other good reason, the Court thinks that the place of trial ought to be changed. If, for instance, in this case, the defendant could have shown us that great expense could have been saved, or that the balance of convenience was strongly in favour of the case being tried at Furridpore," I consider these principles should be the more strictly applied, where as in the present case, we can only determine that a subordinate Court shall not proceed with the suit and cannot direct another Court to proceed with it. The allegations that the suit was purposely instituted in Bassein with a view of its being prevented from being fairly and properly tried, that it is wholly vexatious and instituted with ulterior objects

(1) [1871] 6 C. P. 116=40 L. J. C. P. 138=23 L. T. 705=19 W. R. 411.
(2) [1860] 3 C. B. (n.s.) 761=140 E. R. 942=111 R. R. 829.
(3) [1860] 7 C. B. (n.s.) 835=29 L. J. C. P. 151=6 Jur. (n.s.) 705=141 E. R. 1044=121 R. R. 740.
(4) [1863] 15 C. B. (n.s.) 432=137 R. R. 590.
(5) [1889] 13 Bom. 178.
(6) [1882] 5 All. 60=1882 A. W. N. 164.
(7) [1883] 9 Cal. 980=13 C. L. R. 182.

and at the instigation of Subramanian, have not been substantiated and no grounds have been shown for supposing that justice is not likely to be done in the Bassein Court. As regards the balance of convenience, it does not appear why all the defendants need appear in person; and though their evidence in support of the plea of dissolution is in India, it would appear probable that rebutting evidence to show the continuance of the partnership up to the date of suit would be most likely to be obtainable in Burma, as the plaintiff says it is. It was said that plaintiff might appoint an agent to conduct his affairs in Burma while he went to India for the case, but unless for very strong reasons he ought not to be compelled to do so. Stress was laid on the advantage to the Court of the witnesses being examined before it instead of on commission, but some at least of the evidence on one side or the other must probably in any case be taken on commission.

As regards the books, it would appear more convenient for the old books to be sent back to Burma than for the current ones to be sent to Madras. No grounds were shown for the allegation that the proceedings in Bassein would be more expensive and protracted than in Sivagunga, except that more translation might be necessary than in a Court where the language of the accounts was understood; but in a suit of this sort a certain amount of translation will be necessary in any case, and as in the event of a preliminary decree being passed a commissioner will probably be appointed to take accounts, it should be possible even in this country to appoint as commissioner some one with the necessary knowledge of the language, while it is clear that the winding-up can be more easily effected in the locality where the partnership business was carried on, and in the event of a receiver being appointed that he should be under the supervision and control of a local rather than of a far distant Court.

In my opinion no sufficient grounds have been shown for declaring that the suit shall not proceed in the Court in which the plaintiff is by law entitled to institute it, and I would dismiss both applications, and award each of the two respondents two gold mohurs' costs as advocate's fees.

Twomey, J.—I concur.

K.N./R.K. *Application dismissed.*

A. I. R. 1914 Lower Burma 40

PARLETT, J.

P. L. M. Subramonian Chetty — Appellant.

v.

K. R. V. Vellian Chetty—Respondent.

First Appeal No. 156 of 1912, Decided on 12th May 1914.

(a) Civil P. C. (5 of 1908), S. 104 (1)—S. 104 (1) does not apply to award not complete in itself and exposes party to further suit.

The partners in a money-lending firm referred their disputes and differences regarding certain items to arbitrators agreeing in writing to abide by their award if made by a certain date. The arbitrators made the award by the specified date and directed that as the plaintiff purchased outstandings at a certain valuation the defendant should be responsible for any error or omission in the accounts regarding those outstandings.

Held: that the award did not finally determine the questions referred for arbitration as it exposed the defendant to a suit by the plaintiff for any error or omission subsequently discovered in the accounts, however unintentional it might be. [P 41 C 2, P 42 C 1]

(b) Civil P C. (5 of 1908), Sch. 2, para. 20—Award out of Court cannot be remitted.

There is no provision for remitting to the arbitrators an award made in arbitration without the intervention of a Court. [P 41 C 1]

N. M. Cowasjee—for Appellant.

Coltman—for Respondent.

Judgment.—The plaintiff and the defendant in this suit were the partners carrying on a money-lending business in Moulmein under the firm name of P. L. M., the business being of late years managed by the defendant. Disputes and differences having arisen between them connected with the said business, they on 22nd May 1912 agreed in writng to submit them to the arbitration of three persons whose award or that of the majority of them they agreed to accept if delivered on or before the 30th June. On the 7th June the arbitrators made an award in favour of the plaintiff for Rs. 12,117-6-6, and on the 11th June they amended the sum to Rs. 13,834-12-6. On the 25th June the plaintiff applied to the District Court under Para. 20, Sch. 2, to the Civil P. C., that the award be filed in Court and that judgment be pronounced and a decree passed according to the award. The defendant objected on several grounds, amongst others, that

the award left undetermined certain matters referred to arbitration. The District Court held that this objection was good and dismissed the suit. The plaintiff now appeals under S. 104 (1), Civil P. C.

His first contention is that instead of dismissing the suit the District Court should have remitted the award for reconsideration of the arbitrators under para. 14 (a) of that Schedule to the Civil Procedure Code. The mention in para. 21 (a) of that Schedule of the grounds referred to in para. 14 appears to mean only that proof of the existence of any such ground empowers the Court to refuse to order the award to be filed, whereupon the only course is to dismiss the application. There is no provision for remitting to the arbitrators an award made in an arbitration without the intervention of a Court, such as is made in paras. 14 and 19 of the schedule in respect of awards made on an award of reference by a Court under para. 3 (1) or 17 (4). This construction was put upon the corresponding section of the Civil Procedure Code of 1882 in *Mustafa Khan* v. *Phulja Bibi* (1) where several decisions to a similar effect are referred to and there is no doubt that they are correct.

The second and main contention of the appellant is that the award did definitely and finally settle all matters referred to arbitration : vide Cl. 14 (a), Sch. 2, Civil P. C. The memorandum of agreement to go to arbitration sets out that "wheras differences and disputes have arisen between the said P. L. M. Subramanion Chetty and the said K. R. V. Vellian Chetty regarding the account of his agency and various other matters connected therewith and regarding the claims and counter-claims preferred by the one against the other in respect thereof. Now therefore for putting an end to all such disputes and differences and also all other disputes which may arise between the said parties regarding the conduct of the said Vellian Chetty in the management of the business of the said firm it is hereby mutually agreed by and between them to refer the same to the arbitration of Maung Shw Thwin, Advocate, and S. V. A. R. Subramonian Chetty and A. M. M. Murugappa Chetty of Moulmein who shall have power to examine the parties aad their witnesses and to call for account books, deeds, vouchers and evidence in the possession or power of either of the said parties and whose award or the award of the majority, if made in writing under their hands ready to be delivered no or before the 30th June next, shall be biading and conclusive on the parties. "

The award sets out that the plaintiff claims a dissolution of partnership and the winding-up of the business, a share in the profits of a certain K. V. R. firm and nine specified sums of money. Of these sums the defendant admitted two items and disputed all the others. He claimed certain sums from the plaintiff by way of commission and the return of the key of his private box which he said the plaintiff wrongfully withheld from him. After exmination of the parties they came to an understanding that the partnership should be dissolved, and that the plaintiff should take over all the outstandings except those due by Chetties, at a valuation of Rs. 70,000. The arbitrators then decided each one of both parties' claims and awarded Rs. 12,117-6-6, subsequently amended to Rs. 13,834-12-6, to be paid to the plaintiff, with the Chetties' rate of interest within 15 days. The award however contains the following clause : " As the plaintiff takes over all the outstandings at a valuation we direct that the defendant should render every assistance in his power to enable the plaintiff to realize the same and that the defendant should be responsible for any error or omission in the accounts regarding those outstandings. " It is the latter part of this clause which the defendant chiefly objects to as it does not finally settle the matter in dispute between the parties. If it referred merely to fraudulent errors and omission it might be treated as mere surplusage and considered ineffective. Such however is not the case and clearly was not intended by the arbitrators to be the case as the evidence shows and the effect is therefore to leave without final settlement the largest item of the partnership assets and an integral portion of the accounts between the parties which it was the main, if not the sole, object of the arbitration to completely settle once for all and to expose the defendant to a suit by the plaintiff for any error or omission

(1) [1905] 27 All. 526=(1905) A. W. N. 86=2 A. L. J. 416.

subsequently discovered in the accounts however innocent or unintentional it might be, whereas the intention of the arbitration agreement was certainly to preclude any such future litigation between the parties. In this view therefore the award did not finally determine the questions which were referred for arbitration. It was however argued that the plaintiff had to take over the assets on the basis of the defendant's accounts as he had no means of verifying them. To this I cannot accede. He was in no way bound to accept any of the defendant's figures which he trusted and could have challenged any of them before the arbitrators just as he could before a Court in a suit for an account and if they had wished to do so. the parties could have fixed a longer time within which the award should be made. Having chosen to accept them as correct the plaintiff cannot reopen them later in his own interests, any more than the defendant could in his.

Another argument, so far as I could understand it was that having taken over the outstandings at a valuation the plaintiff assumed a different position as a purchaser of the outstandings and as such he must be allowed to reopen the accounts if he discovered that the valuation was based on error. I doubt if even an outsider who so purchased the outstandings would have any such remedy unless on the ground, of fraud but assuming that he would the privilege could certainly not extend to one party to an arbitration particularly designed to finally settle all disputed accounts between the parties who voluntarily and deliberately took over the outstandings at a valuation agreed upon between them.

Lastly, it was sought to justify this clause on the ground that the parties signified their assent to it by themselves signing the award. The record itself contradicts this. It contains memorandum of "facts admitted by the plaintiff and the defendant," one of which is "that the thumb impression of the plaintiff and the defendant was taken on the award before the delivery of the award and before they knew its contents." The memorandum is not signed and it does not appear who wrote it, though the Judge mentions it in the diary, but it seems that neither the Judge nor the writer referred in this connexion to the award itself which bears no thumb impressions but two signatures which no doubt are those of the plaintiff and the defendant. The arguments of the counsel in the lower Court show that the admission referred to these signatures and consequently it is clear that though the parties did affix their names below the award they did so before it was delievered and before they knew its contents. They cannot therefore be held to have acquiesced in any part of it which was not in accordance with the agreement of reference. I am constrained to hold that the District Court's judgment was correct and would dismiss this appeal with costs ; advocate's fees two gold mohurs.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Lower Burma 42

PARLETT, J.

Maung Kya and *others*—Appellants.

v.

V. P. L. V. N. Firm—Respondents.

Special Second Appeal No. 154 of 1911, Decided on 10th February 1913.

Benami — Real owner cannot object to disposal of property by benamidar it being consequence of his own fraud—He can set aside transfer only by showing his absence of acquiesence and notice to purchaser.

Where property is held benami and the ostensible owner assents to its being disposed of to the prejudice of the real owner, the latter cannot be allowed to object, the fraud being a consequence of his own act. So if the property is purchased in the name of a benamidar, and the indicæ of ownership are placed in his hands, the true owner can only get rid of the effects of alienation by showing that it was made without his acquiesence and that the purchaser took with notice of that fact: *Colonial Bank* v. *Cady*, (1891) 15 *A. C.* 267, *Foll.* [P 43 C 1]

Palit and *Harvey*—for Appellants.

A. B. Banerjee—for Respondents.

Judgment.—Plaintiff sued for a mortgage decree over, among other property, 38·71 acres of land now in the possession of defendants 3 and 4. It appears that on 12th May 1903 a conveyance was executed and registered whereby defendant 1 purported to purchase the land in suit from the former owner Maung Chan Nyein for Rs. 650. On 12th June 1903 defendant 1 mortgaged this land together with 12·54 acres more and some other property to plaintiff without possession for Rs. 1,500 carrying interest at 1 1/2 per cent, per month. On 31st March 1904, a conveyance was executed

and registered whereby defendant 1 purported to sell the land in suit to defendant 2 for Rs. 650. On the same day defendant 2 mortgaged this and other land to defendants 3 and 4 for Rs. 5,000 and on 29th April 1907 he sold it to them outright. Defendant 1 did not appear but the defence of the others is that the real purchaser from Maung Chan Nyein was defendant 2 who borrowed the money to pay for it from defendant 1, who took the conveyance in his name until money was re-paid to him, but that defendant 1 was merely a benamidar and was never in possession of the land, and had no rights in it to mortgage to plaintiff, and that defendants 3 and 4 are bona fide purchasers for value without notice of plaintiff's claim. The Court of first instance gave only a money-decree against defendant 1. On appeal the Divisional Court held that defendant 2 was estopped by his conveyance from saying that defendant 1 was not the owner, and that oral evidence to that effect was excluded by S. 92, Evidence Act, and gave plaintiff a mortgage decree over both pieces of land. Defendants 3 and 4 now appeal against all three decisions. The divisional Court was clearly wrong in giving a mortgage decree over more than the 38 odd acres, since plaintiff had expressly relinquished his claim to a mortgage decree over the other holding.

I am inclined to think that the decision on the question of estoppel was correct, having regard to Dr. Gour's remarks in Art. 611 of his Commentary on the Transfer of Property Act, Edn. 3, p. 371, and in particular to the dictum of Lord Halsbury in *Colonial Bank* v. *Cady* (1) there quoted. The estoppel would extend to defendants 3 and 4 who claim through defendant 2. In Art. 619, p. 378, the same learned commentator quotes authorities to the effect that "where property is held benami and the ostensible owner assents to its being disposed of to the prejudice of the real owner, the latter cannot be allowed to object, the fraud being a consequence of his own act. So if the property is purchased in the name of a benamidar, and the indicae of ownership are placed in his hands, the true owner can only get rid of the effect of an alienation by showing that it was made without his acquiescence, and that the purchaser took with notice of that fact." The consideration of Rs. 650 admittedly moved from defendant 1; the conveyance was in his possession and showed him to be the purchaser: he was recorded as in possession in the revenue registers. The only fact which can be alleged as exisiting which should have put plaintiff on inquiry is defendant 2's claim that he was in possession of the land, but as at that season, 12th June, probably agricultural operations had not commenced it may be doubted whether he or anyone was in actual occupation of the land. I do not think plaintiff can be fixed with constructive notice of the alleged defect in his mortgagor's title, and accordingly the mortgage is good.

I modify the decree of the Divisional Court to one granting plaintiff a mortgage decree over holding No. 23 of 1901-02 which corresponds to No. 27 of 1907-08 of Ahnyet Kwin only. As this appeal has been partly successful each party will bear his own costs therein.

K.N./R.K. *Decree modified.*

(1) [1891] 15 A. C. 267=60 L. J. Ch. 131=63 L. T. 27=39 W. R. 17.

A. I. R. 1914 Lower Burma 43

TWOMEY AND ORMOND, JJ.

Ma E Me and *another*—Appellants.

v.

Ma E—Respondent.

Civil Misc. Appeal No. 8 of 1914, Decided on 1st June 1914.

Probate and Administration Act (5 of 1881) Ss. 69 and 90 (4)—Scope of S. 90 stated—Creditor has no interest unless he has charge under S. 69—Creditor has no locus-standi to oppose probate unless on ground of fraud.

Section 90 refers to immovable property only.

A creditor has no interest in the immovable property of his deceased debtor unless he has a charge on that property under S. 69, Probate and Administration Act, or S. 250, Succession Act.

As a creditor of the estate of a deceased debtor is not merely as such "interested in the property" within the meaning of S. 90 (4), he has no locus standi to come in and object to the grant of Probate or Letters of Administration unless he objects to the grant on the ground that the will is set up in fraud of the creditors. [P 44 C 1]

Agabeg—for Appellants.

Ba Dun—for Respondent.

Judgment.—Ma E Me as administratrix to the estate of her deceased husband, had incurred costs in litigation with Ma E. Ma E attached certain immovable property as being part of the

estate of the deceased; but Ma Thi, obtaining the removal of that attachment on the ground that she had purchased the property from the administratrix, Ma E Me. Ma E then applied to set aside the sale by Ma E Me to Ma Thi as having been made by the administratrix without the leave of the Court. The District Judge granted the application and set aside the sale and he held that by setting aside the sale, the order removing the attachment was ipso facto set aside.

Ma E Me and Ma Thi now appeal. The first question is whether Ma E as creditor of the estate is a person "interested in the property" within the meaning of S. 90, sub-S. 4, Probate and Administration Act. That provision relates to the alienation of immovable property and therefore the words "interested in the property" must be "interested in the immovable property" disposed of. Now a creditor has no interest in the immovable property of his deceased debtor unless he has a charge on that property under the provisions of S. 69, Probate and Administration Act and S. 250, Succession Act, under which the District Judge may issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of Probate or Letters of Administration. A creditor has no locus standi to come in and object to a grant of Probate or Letters of Administration unless he objects to the grant on the ground that the will is set up in fraud of the creditors. In this case the creditor does not allege that the sale was made in fraud of the creditors.

We think the creditor Ma E had no locus standi to have the sale set aside under S. 90. Even if the sale by the administratrix had been properly set aside by the Court under S. 90, the Court had no power to set aside the order of the Township Court removing Ma Thi's attachment. The sale by the administratrix to Ma Thi would be good until it was set aside and it was therefore good when the Township Court ordered the removal of Ma E's attachment. If the order of the District Court setting aside the sale under S. 90 had been correct, it would still have been necessary for the creditor to make a fresh application for the attachment of the property.

We allow the appeal and set aside the order of the District Court with costs, three gold mohurs.

K.N./R.K. *Appeal allowed.*

A. I. R. 1914 Lower Burma 44

TWOMEY, J.

Mi Ah Pu Ma—Defendant—Appellant.

v.

Mi Hnin Zi U—Plaintiff—Respondent.

Second Appeal No. 90 of 1913, Decided on 16th January 1914.

(a) Buddhist Law (Burmese)—Succession—Divorce is prima facie proof of separation of child—Child claiming share must establish that relations were kept up.

When a child is taken away by her divorced mother, the relationship of the child with her father for purposes of inheritance is prima facie severed, and if she afterwards lays a claim to a share in the inheritance, whether of ancestral or non-ancestral property, it has to be shown by plain and unmistakeable outward signs that the tie of relationship with her father was maintained. [P 45 C 1, 2]

(b) Buddhist Law (Burmese)—Succession—Divorce raises presumption that parties' rights are finally settled and this becomes strong when no claim is made for long time.

It is presumed in the absence of special circumstances that the affairs of people divorcing and remarrying are settled definitely at the divorce or remarriage, and the presumption becomes very strong where a long period has elapsed since the divorce and the wife has never taken any steps to claim a share in the property taken by her divorced husband to the second marriage. [P 45 C 1]

Guha—for Appellant.

Judgment.—Maung Kyaw Bon, deceased, was married to three wives in succession and left issue by each of them.

The plaintiff Ma Hnin Zi U is the daughter of the first wife, Mi Tun Kra Pru who was divorced from Kyaw Bom when Ma Hnin Zi U was a small child. Kyaw Bon's second wife died about ten years ago, leaving a son who is not a party to this suit. Kyaw Bon's third wife is the defendant, Ma Ah Pu Ma.

Ma Hnin Zi U sued Ma Ah Pu Ma for a half share of certain land and a house left by Kyaw Bon. It has been found by both the lower Courts that this property was acquired by Kyaw Bon during coverture with Mi Tun Kra Pru, the plaintiff's mother.

At the time of the divorce, 16 or 17 years ago, Mi Hnin Zi U was taken away by her mother Mi Tun Kra Pru and

never afterwards maintained filial relations with her father Kyaw Bon. There is some evidence that she occasionally visited her father and took him fruit and other eatables, but it is admitted that she never spent a night in his house. It is clear that filial relations were not restored.

As to the terms of the divorce the evidence taken on remand shows that no partition of property was effected. As pointed out in *Shwe Lin* v. *Mi Nyein Bu* (1) it is presumed in the absence of special circumstances that the affairs of people divorcing and re-marrying are settled definitely at the divorce or re-marriage. This presumption is very strong in such a case as this where a long period has elapsed since the divorce and the wife has never taken any steps to claim a share in the property taken by her divorced husband to the second marriage. It seems probable in the circumstances that (as conjectured by the District Judge) Mi Tun Kra Pru bought her husband's consent to the divorce by abandoning her share of the joint property. This view is favoured by the evidence of the plaintiff's own witnesses, Ni Aung and Myat No, who state that it was Mi Tun Kra Pru who wanted the divorce. It does not appear that she had any marital fault to allege against her husband and in such a case if she desired a divorce she would have to resign all claim to the joint property.

The present case is similar to that of *Ma Yi* v. *Ma Gale* (2) which was recently decided by a Bench of this Court and in which it was held that the plaintiff, Ma Yi, could not share in the property taken by her father to his second marriage, because she failed to prove that she had any filial relations with him after his divorce from her mother. The Township Court held that the rule as to the resumption of filial relations was inapplicable in the present case because the property in suit was ancestral property. This view is shown to be incorrect in the leading Upper Burma case *Ma Sein Nyo* v. *Ma Kywe* (3). When a child is taken away by her divorced mother the relationship of the child with her father for purposes of inheritance is prima facie severed, and if she afterwards lays claim to a share in the inheritance it has to be shown by plain and unmistakable outward signs that the tie of relationship with her father was maintained. Mr. Burgess considered that this rule should be applied, whether the inheritance consisted of ancestral or non-ancestral property, and his reasons are stated in the following extract from the judgment:

"The judgments of the Courts below do not explain clearly why the plaintiff is qualified to inherit a share of that portion of her father's estate which has been distinguished as ancestral property and disqualified to inherit the other portion which has been found to be the joint property of himself and his wife, the defendant Ma Kywe. They have held that plaintiff has not maintained such a filial relation with her father as would entitle her to share in the joint property and subsequently it must be assumed that notwithstanding this failure of duty on her part, they consider that her claim to share in the ancestral property is not affected. It is apparently because plaintiff did not live with her father and assist in acquiring the property belonging to the second marriage that she has been excluded from the inheritance of such property, and this seems to involve the proposition that neglect of filial duty is immaterial when the inheritance claimed is not that of property acquired during the parent's last marriage, a proposition for which there seems to be no authority in Buddhist law." I cannot find that this Court has ever taken a different view.

On these grounds I find that the plaintiff-respondent is not entitled to share in the property left by her father Kyaw Bon. The decrees of the lower Courts are reversed and the plaintiff's suit is dismissed with costs in all Courts.

K.N./R.K. *Decrees reversed.*

(1) S. J. 175.
(2) [1913] 6 L. B. R. 167=19 I. C. 85.
(3) [1892-96] U. B. R. 159=2 C. T. 360.

A. I. R. 1914 Lower Burma 45

ORMOND, J.

Arachan and *another*—Defendants—Appellants.

v.

Maung Po Win and *another*—Plaintiffs—Respondents.

Second Appeal No. 140 of 1912, Decided on 9th January 1914, from decree of Divisional Judge, Hanthawaddy, D/- 23rd May 1912, in Civil Appeal No. 4 of 1912.

Landlord and Tenant—Rent suit—Decree against lessee—No decree against sub-lessee can be passed for same rent.

A lessor cannot have a decree against both the lessee and his sub lessee for the same rent. Therefore, if he obtains a decree against the former he cannot ask for a decree against the latter. [P 46 C 2]

Munshi—for Appellants.

Maung Po Han—for Respondents.

Judgment. — Plaintiffs-respondents leased certain paddy lands for the year 1272 to Maung Ne Dun for 1250 baskets of paddy. Maung Ne Dun leased the same lands for the same period at the same rent to the appellants-defendants. Plaintiff received 610 baskets towards the rent and sued both his lessee and the sub lessees for the balance, viz., 640 baskets or their value. The sub lessees (appellants) have paid 600 baskets of paddy to Maung Ne Dun who has accepted them in full satisfaction of the rent, there having been a theft of appellants' paddy. Both the lower Courts have found, as a fact, that the appellants have thus paid the rent in full to the lessee, Maung Ne Dun. In the Subdivisional Court, the plaintiffs obtained a decree ex parte against the lessee, Maung Ne Dun, and the suit was dismissed as against the sub-lessees, on the ground that there was no privity of contract between the lessor and the sub-lessees. The Divisional Court, on appeal by the plaintiffs, granted a decree against the sub lessees (the present appellants), on the ground that there was privity of estate, following the decision of *Hossain Ismail Atcha* v. *Ebrahim Mahomed Makda* (1). In that case it was held that a lessor could recover from a sub-lessee for the whole of the remainder of a term rent, because such sub-lease operates under English law as an assignment of the term, and rent is a covenant that runs with the land. I would observe that under English law a sub-lease for the remainder of a term would not operate as an assignment of the term, unless it were by deed, and the extent of the principle that a sub-lease for the whole of the sub-lessor's term amounts to an assignment has been much controverted: see Woodfall's Landlord and Tenant, Edn. 19, p. 297. The proposition rests upon the technical doctrine of English law that a lease requires a reversion to suport it. Under S. 105, T. P. Act, which defines a lease, there is nothing to show that a lessee cannot make a sub-lease for the whole of the remainder of his lease; and with all due deference, I think it is unnecessary and inappropriate to import into Indian law the above technical rule of English law.

It is not necessary to refer the matter to a Full Bench because this appeal must be allowed on the ground that the plaintiffs cannot have a decree against both the lessee, Maung Ne Dun, and the sub-lessees (appellants) for the same rent. They have a decree against Maung Ne Dun, and this precludes them from asking for a decree against the appellants: see *Macnaghten* v. *Lalla Mewa Lall* (2). In *Kunhanujan* v. *Anjelu* (3), which is referred to in *Hossain Ismail Atcha Ebrahim* v. *Mahomed Makda* (1), it is stated: "The original lessor may sue the original lessee upon his express covenant, and also the assignee upon the privity of estate, though he can have execution against one only'. If the plaintiff can have execution against one only, he can have judgment against one only. The appeal is allowed with costs and the suit will stand dismissed as against the appellants.

K.N./R.K. *Appeal allowed.*

(1) [1905-1906] 3 L. B. R. 90=11 Bur. L. R. 265.

(2) [1879] 3 C. L. R. 285.

(3) [1894] 17 Mad. 296.

A. I. R. 1914 Lower Burma 46

ORMOND AND PARLETT, JJ.

Ramanathan Chetty and *others*—Appellants.

v.

Bank of Bengal—Respondent.

First Appeal No. 117 of 1912, Decided on 26th March 1914, from decree on the original side.

(a) Contract Act (9 of 1872), S. 188—Agent unless so authorized cannot make his master surety or borrow in his name for another or thrust partner or sign promissory note jointly with others.

Unless expressly so empowered an agent cannot make his principal a surety for another's loan, nor can he borrow money in his principal's name for another, nor can he thrust a partner upon his principal or sign a promissory note for his principal jointly with another person. [P 48 C 1]

(b) Contract Act (1872), S. 188—Chetty banking—Standing guarantee for others not Chetties is not necessary incident of Chetty banking.

It is not a necessary incident in a Chetty banking and money-lending business that the Chetty

must necessarily guarantee another Chetty, that is, it is no part of the Chetty business to stand guarantee for others who are not Chetties.

[P 49 C 1]

(c) Contract Act (9 of 1872), S. 188—Powers-of-attorney must be strictly constructed—Onus of proving extra powers is on person alleging Powers-of attorney.

Powers-of-attorney must be construed strictly and unless an express power is given to an agent to enter into contracts of guaranree on behalf of his principal or to execute negotiable instruments for his principal jointly with others, it rests on the person alleging such power in the agent to show that in fact the agent had authority to enter into such a transaction. [P 49 C 1]

J. R. Das – for Appellants.

Giles—for Respondent.

Ormond, J.—The plaintiff bank sues the defendant firm for the sum of Rupees 50,000 with interest in the following circumstances: on 23rd May 1908 one Hashim Ebrahim had a cash credit account with the plaintiff bank and in order to secure the same, upon the request of the plaintiff bank, executed a pro-note for Rs. 50,000 and interest, in accordance with the practice of the bank, in favour of the defendant firm. The agent of the defendant firm endorsed the said pro-note over to the bank and at the same time executed an agreement guaranteeing the payment of the said cash credit account. The defence is a denial of the authority of the agent to enter into the contract of guarantee. It is proved that the defendant's agent entered into 23 transactions with the bank as surety for others between 1904 and May 1908, 6 1/2 of which were guarantees of person other than Chetties. On 21st July 1906 the defendant's agent guaranteed this man, Hashim Ebrahim, and on 3rd of November 1906 the defendant's agent was guaranteed by Hashim and the firm of S. R. M. The learned Judge on the original side in his judgment says: "Now having regard to the approved practice and to the ordinary presumptions, that must arise as to the ordinary course of business and human affairs, it is impossible to hold that these agents (defendant's agents) had never submitted accounts to their principal and that he should have remained in ignorance of the fact that they were not only carrying on this branch of Chetty banking business but were doing so to a very large extent. Defendant held out Chokalingum Chetty as his agent in Rangoon with a full general power to transact business on his behalf. The agent was guaranteeing other people's loans and no exception was taken by the principal to this conduct on his behalf for years, and in my opinion it must therefore be held that he held his agent out as having the power to guarantee the accounts, and further that the power in so guaranteeing was ratified and confirmed by him. Notice was given him (defendant) to produce his account books but they have not been produced. These account books would have shown these transactions. They would have shown the receipt of commission which would be consideration. Further the agreement itself sets out a consideration. It is at the request of the defendant's agent that the cash credit account is given and that imports a consideration." The Judge therefore gave the plaintiff a decree. The defendant was the sole proprietor of that firm and is dead

The question of ratification was first raised by the plaintiff when the case came on for hearing. The books were not produced before because the only question was, Had the agent authority to enter into this transaction? The learned Judge has assumed that commission was charged for this transaction, that these transactions must have been entered in the books and that the agent sent the books to his principal, and therefore that the principal knew of these transactions of guarantee. In order to make the defendant liable upon a ratification the plaintiff must show that the defendant had full knowledge of the facts. There is no question whether there was consideration to support a contract of suretyship as between the bank and the defendant. Mr. Giles, who appears for the plaintiff-respondent, admits that the question is not really one of ratification, but whether the authority to enter into the transaction of guarantee must necessarily be implied from the powers conferred in the power of attorney. The power-of-attorney is in the form generally used amongst Chetties. It recites the desire of the principal to appoint the agent his attorney for the general management of his banking and money-lending business. It then constitutes the agent the lawful attorney to transact, conduct and manage all and every or any of the affairs, concerns, matters and things in which the principal then was or thereafter might be in any wise interested and concerned and

for that purpose to use or sign the principal's name on any documents whatsoever, to borrow money from banks, firms or persons, either with or without a pledge of securities for money advanced to various persons, to make, draw, sign accept, endorse, negotiate and transfer bills of exchange, pro-notes, etc., to which the principal's signature of endorsement might be required or which the attorney might in his absolute discretion think fit, in the name of the principal. The agent therefore had a general authority to carry on the business of a Chetty banker and money-lender on behalf of his principal as the sole proprietor of the business and an express power to borrow money and to endorse promissory notes for the purposes of that business. He would not be authorized (without an express power to that effect) to enter into any transaction under which his principal incurred a liability, unless such transaction was a necessary incident in the carrying on of a Chetty banking and money-lending business. If the transaction entered into by the agent is on the face of it authorized by the power-of-attorney, the bank need not look to the application of the money by the agent, but if it is shown that the bank had notice of the real nature of the transaction and such transaction is not within the scope of the agent's authority, the principal would not be liable. In this case the agent endorsed a promissory note in favour of the bank in the name of his principal, and he has an express power to do so, but at the same time he signed for his principal on a letter of guarantee in favour of the bank on behalf of Hashim Ebrahim for the whole amount for which the promissory note was given. The bank therefore knew that none of the money was being taken by the agent as a loan to his principal. The agent was given certain specified or express powers; but they do not include a power to make his principal a surety for another's loan; and they do not include a power to borrow money in his principal's name for another, or to sign promissory notes for his principal jointly with another principal.

If he had been given such a power as the last, an authority to guarantee the debt of another might well be inferred because since he clearly has no power to thrust a partner upon his principal, if he had the power to sign promissory-notes for his principal jointly with another, the manifest effect of such a transaction would be that, as between the two makers of the note each is a surety for the other as to the amount taken by that other. The sole question then is, is it a necessary incident of the business to guarantee the loans of others? If such transactions are entered into for a commission, the business would not be so much a money-lending business as an insurance business. If such transactions are merely mutual accommodations, it must be shown that such mutual accommodations are necessary. Loans can be raised on security without sureties and the fact that the Presidency Banks Act requires two independent signatures for a loan on a promissory note is not sufficient to show that such mutual accommodations are necessary for the business.

The bank have called two Chetties in support of the proposition that it is a necessary incident in a Chetty's money-lending business to guarantee the debts of others. Ramanathan Chetty, the P. W. 2, the agent for the R. M. M. S. T, firm says that his firm has not guaranteed overdrafts of accounts of persons other than Chetties. He has heard that some Chetties do guarantee, in such cases the Chetty gets a commission. In cross-examination he states that "those whose principal allowed them to guarantee the overdrafts of other people, they guarantee." His own principal has told him that he should not guarantee people other than Chetties. The other Chetty Udiappa, P. W. 5, who is the agent of the V. A. R. firm, says: "It is left to the option in Rangoon of the agents to guarantee the overdrafts of others. Some take the authority from the principal before for so doing and some do so after the transaction has been entered into. Some principals do not allow their agents to do this guarantee business at all." Mr. Giles contends that inasmuch as the Presidency Bank Act requires the signatures of two persons (who are not partners) for a loan on a promissory note, the defendant must have known from the cash credit account at the Bank of Bengal that other persons had stood guarantee for him and that therefore he must have assumed that his agent was standing guarantee

for others, and that it is a normal feature to mutually guarantee in Chetty banking business. It is not shown that the defendant would know of the cash credit account at the Bank of Bengal, and I do not think it is made out that it is a necessary incident in a Chetty banking and money-lending business that the Chetty must necessarily guarantee another Chetty. It is certainly not made out in this case that it is part of the Chetty business to stand guarantee for others who are not Chetties. Powers-of-attorney must be construed strictly, and unless there is an express power given to the agent to enter into contracts of guarantee on behalf of others, or to execute negotiable instruments jointly with others, it rests on the bank or other person lending the money to show that the agent had in fact authority to enter into such a transaction.

I would allow the appeal and dismiss the suit with costs in both Courts.

Parlett, J.—I concur.

K.N./R.K. *Appeal allowed.*

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* A. I. R. 1914 Lower Burma 49

FOX, C. J. AND HARTNOLL, J.

In the matter of *I. A. Sofaer* and *others*—Insolvents.

Civil Ref. No. 10 of 1914, Decided on 11th August 1914.

*** (a) Presidency Towns Insolvency Act (3 of 1909), Ss. 17 and 99—Under S. 99 (1) firm can be adjudged insolvent—Order operates against each partner.**

Under sub-S. 1, S. 99, an adjudication order can be made against a firm in the name of the firm and the order operates on the property of each partner. [P 51 C 1]

(b) Lower Burma Chief Court Insolvency Rules, R. 83—R. 83 is ultra vires.

Rule 83, Insolvency Rules, is ultra vires. [P 51 C 1]

Glenville—for Sofaer.

McDownell—for Hongkong Bank and other certain creditors.

Order of Reference

Robinson, J.—An application was made on 6th June 1913 headed: "In the matter of Sofaer & Co.," and then corrected to, "of I. A. Sofaer and others carrying on the business of traders in co-partnership under the style of Sofaer & Co."

The prayer at the end of the petition is: "Wherefore we hereby petition the Court for an order adjudicating the said Sofaer & Co. insolvents."

The order on this: "I therefore make an order of adjudication as prayed, schedules to be filed within thirty days."

The formal order of adjudication follows the phraseology of the heading of the petition, that is, it adjudges I. A. Sofaer and others carrying on the business of traders in co-partnership under the style of Sofaer & Co., insolvents. I. A. Sofaer appealed against this order, but his appeal was dismissed. He has filed his schedules.

On 24th January 1914 the National Bank of India, Limited, one of the creditors, petitioned for an order under S. 99 of the Act for an order directing the disclosure of the names of the partners in Sofaer & Co. I. A. Sofaer then filed an affidavit that his brother M. A. Sofaer was his partner and that a deed of partnership was executed. He does not state this explicitly, but sets out various facts and acts and leaves it to the Court to decide if his brother is his partner.

Some correspondence then passed between the Official Assignee and M. A. Sofaer's counsel as to M. A. Sofaer filing his schedules and finally the petition on which orders have now to be passed was filed.

It recites that Sofaer & Co. were adjudicated and prays that the Court will direct M. A. Sofaer to file his schedule.

For M. A. Sofaer it was urged that although a deed of partnership was drawn up the facts were such that it had not the legal effect of making him a partner. I however told counsel I would not hear him on that point at present, as it appeared to me that what had to be decided was whether the firm of Sofaer & Co. had been adjudicated, and if so whether M. A. Sofaer, assuming he was a partner, had been adjudicated although the partners were not individually adjudicated by name.

The first question is: Can a firm be adjudicated in the firm's name? On 6th May 1913, *In the matter of the M. L. R. M. A. firm, Case No.* 51 *of* 1913, my brother Ormond passed the following order:

"The question whether a firm can be adjudicated in the firm's name to be argued hereafter. S. 99 of the Act would seem to allow it, but R. 83 expressly

forbids it. Subject to objection let the firm of M. L. R. M. A. be adjudicated insolvent."

This was an ex parte order. The matter came up again on the petition of an alleged partner and my brother Young, J., apparently also thought the section allowed this and that R. 83 was ultra vires. The matter is one of considerable difficulty and of very great importance.

Section 99, Presidency Towns Insolvency Act, which follows S. 115 of the English Act, clearly provides that the Court may order the disclosure of the names of the persons who are partners in the firm. Then the section provides that in the case of a firm in which one partner is an infant an adjudication order may be made against the firm other than the infant partner.

To my mind it is clear that whatever may be the value of the argument that the first subsection only refers to the initiation of proceedings in the firm's name, the section as a whole does contemplate and authorize the Court to pass an order of adjudication against a firm in the firm's name. If this is so then, in my opinion, R. 83 of our rules is ultra vires. S. 112 gives the Courts power to make rules "for carrying into effect the objects of this Act" and in particular such rules may provide for and regulate * * * *

"(o) the conduct of proceedings under this Act in the name of a firm."

Rule 83 however directly forbids what S. 99 allows, that is, an order of adjudication being made against a firm in the firm's name. If I am right in my view of S. 99, it is ultra vires as overriding instead of carrying into effect one of the objects of the Act. Again, it is, I consider, open to grave doubt if this rule can properly be said to regulate the conduct of the proceedings against a firm. However right and proper it may be to permit proceedings to be initiated against a firm in the firm's name and however right and proper the provision made by this rule may be, I have now to deal with the Act and the order of adjudication passed.

Before however expressing my own opinion I think I should note certain facts in relation to the English Act on which our Act is based and as contained in the rules of the High Courts.

Under the English Act the procedure is different and the present difficulty seems to be due to an attempt to utilize certain provisions of, and certain decisions under, the English Act and embody them in our Act.

Under the English Act proceeding may be said to commence with a receiving order. A receiving order may be made against a firm in the firm's name other than an infant partner : see *Lovell* v. *Beauchamp* (1). The English R. 264, which is the same as our R. 83, has reference to this stage of the proceedings. Under the English Act the adjudication order comes at the end and it must be made against individual partners by name. Our Act places the adjudication order at the commencement of the proceedings, but has not made the salutary provision as to specifying individual partners by name. Our rules strive to cure the defect by incorporating an English rule dealing with a totally different stage of the proceedings.

The rules of the Madras High Court seem to be the same as those of this Court. There is no such rule in the rules of the Calcutta High Court, cf. Rr. 150 and 151, nor in those of the Bombay High Court; but R. 154 of the latter lays down that the effect of an adjudication of a firm in the firm's name is to adjudicate every person who was at the date of the order a partner, insolvent.

To return to the present case. In my opinion the order of adjudication here, namely the adjudication of "I. A. Sofaer and others carrying on the business of traders in co-partnership under the style of Sofaer & Co." is an adjudication made against the firm in the firm's name. I see no force in the argument addressed to me that this could only be done by adjudicating Sofaer & Co. thus insolvents.

The question as to what is the effect of such an adjudication of a firm on individual partners is much more difficult. The adjudication of a firm vests the firm's property in the Official Assignee. If, as the Bombay rule lays down, the effect is that each partner individually is adjudicated, then apparently his individual property also so vests; but this may not be so. It is easy to conceive cases where individual partners have never committed an act of insolvency except in their

(1) [1894] A. C. 607=63 L. J. Q. B. 802=11 R. 45=71 L. T. 587=43 W. R. 129=1 Manson 467

capacity as partners, of which acts they may have been totally ignorant while they may be in no sense insolvent. As our Act at present stands, and as I understand it, I am inclined to think that the effect is that an order in the firm's name adjudicates each partner. If so, M. A. Sofaer has been adjudicated and must file his schedule. He can still however move the Court to annul the adjudication as regards himself, and in doing so could raise the question whether he is a partner; or if I passed orders he could appeal.

I am of opinion that the questions arising are so important and far-reaching and so difficult that I should refer certain questions for a decision by a Bench of this Court or by a Full Bench as the Chief Judge may decide.

I accordingly refer under S. 11, Lower Burma Courts Act, the following questions:

1. Can an adjudication order be made against a firm in the firm's name?

2. If so what is the effect of such an order on partners in the firm not named individually in the order?

3. Is R. 83 of this Court's insolvency rules ultra vires?

Judgment.—It is clear that under sub-S. 1, S. 99, Presidency Towns Insolvency Act, 1909, an adjudication order can be made against a firm in the name of the firm. The answer to the first question is in the affirmative.

The necessary effect of such an order on the adult partners in the firm is that stated in S. 17 of the Act, and the order operates on the property of each partner.

The second question is answered accordingly.

The answer to the third question referred is in the affirmative.

K.N./R.K. *Reference answered.*

A. I. R. 1914 Lower Burma 51

HARTNOLL, OFFG. C. J. AND TWOMEY, J.

Chas. R. Cowie and Co.—Appellant.

v.

W. H. A. Skidmore—Respondent.

Civil Misc. Appeal No. 197 of 1913, Decided on 3rd March 1914.

(a) Civil P. C. (5 of 1908), O. 21, R. 40—Arrested judgment-debtor should not be released if decree-holder proves that he is capable of paying but refuses — Burden of proof of inability to pay through poverty is on judgment-debtor.

When a judgment-debtor is arrested and brought before a Court the burden is on him to prove that from proverty or other sufficient cause he is unable to pay the amount of the decree or if that amount is payable by instalments, the amount of the instalment due. [P 52 C 1]

A Court should refuse to direct a release of a judgment-debtor under O. 21, R. 40, if the judgment-creditor shows that the debtor is in a position to pay a substantial part of the decretal amount or instalment, as the case may be, and has refused or neglected to do so. [P 53 C 1]

(b) Civil P. C. (5 of 1908), O. 21, R. 40 (2) (d)—Words "some part thereof" do not restrict R. 40 to instalment decree only.

The words "some part thereof" in R. 40 (2) (d), O. 21, refer to decrees for payment of money generally and not only to instalment decrees. [P 53 C 1]

Mc'Donnell—for Appellant.

Bijapurkar—for Respondent.

Hartnoll, Offg. C. J.—The appellants obtained a decree against the respondent on 6th January 1913 for Rs. 2,870 and costs. Two abortive attempts were made in May and July to execute this decree by applications for the arrest and imprisonment of the judgment-debtor, and on 13th November last another application was made to the same effect. This time the judgment-debtor was arrested and brought before the learned Judge on the original side who passed the following order: "The judgment-debtor states that he is and has been since the passing of the decree unable to pay the debt. McDonnell for judgment-creditor states that he could get evidence to show that the judgment-debtor has during the last 12 months been in a position to pay a portion of the decree and that he is not in a position to bring evidence to show that he was able to pay his debt in full under O. 21, R. 40 (1). I order the release of the debtor as the decree was payable by instalments." This order is appealed against and it is urged that the learned Judge on the original side erred in ordering the respondent's release. O. 21, R. 40, is follows: Where a judgment-debtor . . . . . is brought before the Court after being arrested in execution of a decree for the payment of money and it appears to the Court that the judgment-debtor is unable from poverty or other sufficient cause to pay the amount of the decree or, if that amount is payable by instalments, the amount of any instalment thereof the Court may upon such terms (if any) as it

thinks fit, make an order disallowing the application for his arrest and detention. or directing his release, as the case may be." Appellant's counsel urges that the burden of proof lay on the respondent to prove that he was unable from poverty or other sufficient cause to pay the amount of the decree and quotes an Upper Burma case *Bhaimia Ahmid Ismailjee* v. *Kadir Set* (1) in support of of such contention. I am of opinion that he is right. The case is one that comes both under S. 102 and S. 106, Evidence Act. The law allows imprisonment to recover debt and prima facie the judgment-debtor was liable to be committed. It was for him to traverse that liability by proving poverty or other sufficient cause. Moreover, such reasons would be especially within his knowledge and so S. 106 is applicable.

It is further urged that the learned Judge erred in ordering the release of the judgment-debtor as the decree was not payable by instalments. O. 21, R. 40 (2) says : "Before making an order under sub-R. (1) the Court may take into consideration any allegation of the decree-holder touching any of the following matters :

(d) refusal or neglect on the part of the judgment-debtor to pay the amount of the decree or some part thereof when he has, or since the date of the decree has had, means of paying it."

The learned Judge was apparently of opinion that as the decree was not payable by instalments and as the decree-holder could not prove that, since the date of the decree, the judgment-debtor could have paid the amount of the decree in full, he was entitled to be released. This seems to be reading into O. 21, R. 40, (2) when construing its meaning with reference to O. 21, R. 40 (1), the following meaning, namely, that if the amount of the decree is not payable by instalments but payable in one lump sum, the decree-holders have to prove that since the date of the decree the judgment-debtor could have paid the whole amount before they can ask the Court to take his refusal or neglect to do so into consideration—that it is only in the case of a decree payable by instalments that the Court can take into consideration his refusal or neglect to pay a portion of the decree, the portion apparently to be the amount of the instalment due when he has since the date of the decree had the means to do so. I do not read the subsection in this way. I read their meaning to be as follows : When the judgment-debtor is arrested and brought before the Court it is open to him to prove to the Court that from poverty or other sufficient cause he is unable to pay the amount of the decree, or if that amount is payable by instalments the amount of the instalment due. If he can do so, the burden of proof lying on him and the decree-holders being given the opportunity of proving the contrary, the Court can order his release. But before doing so the Court can take into consideration any of the acts of bad faith set out in sub-R. (2), whether the decree is payable in one lump sum or by instalments. Sub-R. (2) refers to sub-R. (1) generally, and I cannot read into sub-R. (2) the meaning that portions of the words in Cl. (d) of it are only to refer to portions of words in sub-R. (1). To read such a meaning into the section would mean that, if a decree was passed against a judgment-debtor for Rs. 5,000 and the decree-holder could prove that since it was passed he had been able and was able to pay Rs. 4,950 he would not be able to get him committed as he could not prove that the judgment-debtor could pay the remaining Rs. 50.

This in my opinion was never meant, and, in my opinion, the ordinary meaning to attach to sub-R. (2) (d) is that if the decree-holder can prove that since the passing of the decree the judgment-debtor has had the means to pay the amount of the decree, whether it is payable in one lump sum or by instalments, in whole or in part, the Court can take into consideration such fact before passing an order under sub-R. (1).

It is urged by respondent's ccunsel that all witnesses should have been produced by the decree-holder when the judgment-debtor was produced before the Court. That seems unreasonable, as the decree-holder is not in a position to tell when a judgment-debtor will be arrested, especially if he is trying to evade arrest, and he may not be able to

(1) [1897-01] U. B. R. 279 (Civ.).

collect his witnesses at a minute's notice. O. 21, R. (40) (3), provides for such a situation as it gives the Court power, while any of the matters in sub-R. (2) are being considered, to order the judgment-debtor to be detained in the civil prison or leave him in the custody of an officer of the Court, or release him on his furnishing security to the satisfaction of the Court for his appearance when required by the Court.

The question remains as to what should be done. I would set aside the order of the learned Judge on the original side and direct that on application by the decree-holder he do again secure the attendance of the judgment-debtor or attempt to do so, and that if such attendance be secured, he do proceed to dispose of the case in accordance with the procedure indicated by me in this order.

I would give the appellants their costs in this appeal, fixing their advocate's fee at three gold mohurs.

Twomey, J.—I agree that we should construe the words "some part thereof" in R. 40 (2) (d) in their general sense, and not as referring only to the case of a decree payable by instalments. Reading sub-Ss. (1) and (2) together I think the intention is clearly that even if the debtor succeeds in satisfying the Court that he is unable to pay the full amount of the decree (or instalment as the case may be), the Court should nevertheless refuse to direct his relase if the judgment-creditor shows that the debtor has been in a position to pay a substantial part of the decretal amount (or instalment as the case may be) and has refused or neglected to do so. For such refusal or neglect is an act of bad faith only less in degree than a similar refusal or neglect in respect of the whole amount due. Sub-S. (2) (d) in its ordinary grammatical meaning permits the Court to take into account the minor as well as the major act of bad faith, and it would, in my opinion, be unreasonable to interpret the clause otherwise. I therefore concur in the proposed order.

K.N./R.K. *Order of release set aside.*

A. I. R. 1914 Lower Burma 53

ORMOND, J.

Maung Po Maung—Plaintiff-Appellant.

v.

Maung Kaing and *another*—Defendants—Respondents.

Special Second Appeal No. 213 of 1912, Decided on 23rd December 1913.

(a) Transfer of Property Act (4 of 1882), S. 55—Unregistered sale for over Rs. 100 after Act made applicable is invalid—But purchaser in possession can have charge on property for purchase money and interest.

An unregistered sale transaction in respect of immovable property worth Rs. 1,000 entered into after the extension of the Transfer of Property Act to Burma, is invalid, but a vendee who has paid the purchase money and has been in possession under the contract of sale has, under S. 55, sub-Cl. (6), Cl. (b), of that Act, a charge on the property for the amount paid by him in advance as purchase-money and for interest on that amount. [P 54 C 1]

(b) Evidence Act (1 of 1872), S. 102—Onus of proving that transaction took place after Transfer of Property Act is on person alleging it.

Where the vendee has been in possession and was put into possession as owner, the burden of proving that the transaction took place after the extension of the Act and that the vendee did not thereby acquire the right of ownership, lies upon the person disputing the right. [P 54 C 1]

Ba U—for Appellant.

Ba Dun—for Respondents.

Judgment.—The plaintiff-appellant obtained a money decree against San Nyein and attached the land in question and a house thereon as being the property of his judgment-debtor. The defendant, Maung Kaing, applied to have the attachment removed, and succeeded. The plaintiff then brought this suit for a declaration that the land and house was the property of his judgment-debtor and liable to be attached by him. In this appeal the plaintiff-appellant abandons his claim for a declaration as to the house. It is admitted that some years ago the defendant Maung Kaing agreed to purchase this land from San Nyein; that he paid San Nyein the purchase money, Rs. 1,000, and was put into possesion as owner and has continued in uninterrupted possession up to date. There was no registered conveyance, The question then arose whether the transaction was made before 1st January 1905 or not. If the transaction was subsequent to that date, the Transfer of Property Act applies, and the sale was invalid; but the defendant having

paid the purchase money and being in possesion under the contract of sale has, under S. 55, sub-Cl. (6), Cl. (b) of that Act, a charge on the property for the amount paid by him in advance as purchase money and for interest on that amount.

I am referred to a case of *Ma Lon Ma* v. *Maung Shwe Byu* (1) in which the learned Judge held that the defendant was entitled to a charge on the property which he had bought under an invalid sale and of which he was in possession. I think the learned Judge overlooked the provisions of S. 55, sub-Cl. 6 (b), T. P. Act. The case of *Lalchand Motiram* v. *Lakshman Sahadu* (2), is an authority on the point. If then the transaction took place since 1st January 1905 the plaintiff would be entitled to attach the land in question, subject to the charge of Maung Kaing for Rs. 1,000 plus interest at 6 per cent. from the time of the contract of purchase. But if the transaction took place before 1st January 1905 the sale to Maung Kaing would be a good sale. The case was heard in March 1912. The plaintiff's witness, San Nyein, says he sold the land about seven years before. The defendant and his witnesses say that the transaction took place about eight years before—in 1903 or 1904. The evidence as to the date of the transaction is very indefinite. The District Judge thought the evidence for the defence was the more reliable. I think the decision on this point must depend upon the question: Upon whom does the onus lie to show that the transaction as a sale was valid or invalid? It is admitted that the defendant is in possession and was put into possession as owner by San Nyein who was then the owner. The onus, I think, is on the plaintiff to show that the transaction took place since the 1st January 1905 and that the defendant did not thereby acquire the right of ownership in the land. This onus the plaintiff has failed to discharge. I therefore dismiss this appeal with costs.

K.N./R.K. *Appeal dismissed.*

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(1) [1911] 10 I. C. 919.
(2) [1904] 28 Bom. 466=6 Bom. L. R. 510.

A. I. R. 1914 Lower Burma 54

PARLETT, J.

Chandi Charan Sen—Appellant.

v.

Ram Coomar Chakravarti — Respondent.

Second Appeal No. 122 of 1911, Decided on 11th July 1912.

Civil P. C. (5 of 1908), S. 145 and O. 21, R. 11 (1)—Surety bond held not in accordance with Court's order—Surety bond held sufficiently complied with for discharge of surety.

D. M. Biswas was summarily arrested under O. 21, R. 11 (1). Upon his praying for release on furnishing the security of three sureties for the payment of the decretal amount and costs, the Judge ordered his release on his sureties furnishing security for his appearance on 1st August 1909, the date when the period for appeal against the decree expired, failing which the sureties would be held liable for the decretal amount and the judgment-debtor would be re-arrested and committed to jail. An appeal was duly preferred on 27th July 1909 and dismissed on 14th October 1909. The bond which the sureties actually signed was for the due performance of such decree as might ultimately be binding on the judgment-debtor and was to be operative upon the judgment-debtor's failure to satisfy it. It said nothing about his appealing or about producing him before the Court on 1st August 1909.

Held: that it was clearly not in accordance with the order of the Court.

Held also: that what the Court ordered and the appellant agreed to was that the judgment-debtor's appearance on 1st August 1909 should discharge the sureties and that it was then the Court's duty to re-arrest the judgment-debtor and commit him to prison. [P 55 C 1, 2]

The next question was whether the surety had fulfilled his obligation.

The proceedings showed that the judgment-debtor appeared before the Court between 10th August 1909 and 5th April 1911 (both inclusive.)

Held also: that not only did the judgment-debtor duly appeal but that he appeared in Court on numerous occasions both before and after his appeal was dismissed, extending over a period of 2½ years and that therefore the purpose for which the appellant had been ordered to furnish security had been fulfilled and that the appellant had been discharged from liability. [P 55 C 2]

Maung Pu—for Appellant.

B. Banerji—for Respondent.

Judgment.—D. M. Biswas was summarily arrested under O. 21, R. 11 (1). Upon his praying for release on furnishing the security of three sureties for the payment of the decretal amount and costs, the Judge ordered his release on his sureties furnishing security for his appearance on 1st August 1909, the date when the period for appeal against the decree expired, failing which the sureties would be held liable for the decre-

tal amount. The order explained that the judgment-debtor intended to appeal for which purpose he would be allowed to be at liberty for two months, but if he failed to appeal within that time he would be re-arrested and committed to jail. An appeal was duly preferred on 27th July 1909, and dismissed on 14th October 1909.

The bond which the sureties actually signed was for due performance of such decree as might ultimately be binding on the judgment-debtor, and was to be operative upon the judgment-debtor's failure to satisfy it. It said nothing about his appealing, or about producing him before the Court on 1st August 1909. It was clearly not in accordance with the order of the Court. The Divisional Court held that it was binding upon the sureties in the terms in which they signed it and ordered execution to proceed against appellant who is one of the sureties. It held that appellant as a man of ordinary prudence might be presumed to have understood and acquiesced in the terms of the bond which he signed. That presumption is under the circumstances but a weak one. Appellant from the first asserted that he was ignorant of its real terms and believed that he merely bound himself to produce the judgment-debtor on 1st August 1909, if he failed to prefer an appeal before that date. There was no evidence. The bond is printed in Burmese, which is not appellant's language; it is not stated that he could or did read or understand it or that it was read or explained to him. It is quite likely it was not, and that appellant not unnaturally took it for granted that the bond he was called upon to sign embodied the conditions laid down in the order which the Judge had just pronounced.

The Divisional Court presumed that appellant knew the contents of the bond, but the Court did not, and that, as a mistake of fact on the part of one party only to a contract did not, under S. 22, Contract Act, render it voidable; it was valid and could be enforced against the appellant. I should be inclined to reverse the position. However I think if the Contract Act is to be invoked at all S. 13 is more apposite, and that there is no consent between the Court and the appellant as they did not agree upon the same thing in the same sense. The appellant offered security for the judgment-debtor's appearance, failing which he bound himself to pay the decretal amount. The Court took his security to pay the decretal amount if and whenever the judgment-debtor failed to pay.

It is open to question whether the security bond, as actually taken, could be enforced at all, as it does not appear to be in accordance with any provision of law. Apparently the nearest analogy to any such bond would be that provided for in R. 2, O. 38, where the surety must bind himself to pay the decretal amount in default of his principal's appearance.

To leave abstract consideration, I consider it quite clear that what the Court ordered and the appellant agreed to was that the judgment-debtor's appearance on 1st August should discharge the sureties; it was then the Court's duty to re-arrest the judgment-debtor and commit him to prison. It is therefore for consideration whether the surety has fulfilled his obligation. He says he produced the judgment-debtor on 1st August 1909; the proceedings do not show it; but they do show clearly that the judgment-debtor appeared before the Court in some or all of the following dates: 10 August; 6th, 10th and 24th September; 3rd and 8th November: 10th December 1909; 19th Junuary; 4th March; 3rd and 28th May; 26th June 1910; and 3rd and 5th April 1911. It is obvious therefore that not only did the judgment debtor duly appeal but that he appeared in Court on numerous occasions both before and after his appeal was dismissed, extending over a period of over 2 1/2 years. I hold therefore that the purpose for which the Subdivisional Judge on 31st May 1909 ordered appellant to furnish security has been fulfilled and that appellant has been discharged from liability. The appeal is allowed with costs in all Courts: advocate's fees two gold mohurs, and appellant is declared to be discharged from liability under the bond signed by him on 31st May 1909.

K.N./R.K. *Appeal allowed.*

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A. I. R. 1914 Lower Burma 56

TWOMEY AND PARLETT, JJ.

R. M. A. R Firm—Appellant.

v.

M. R. M. S. Firm and *others*—Respondents.

First Appeal No. 5 of 1913, Decided on 9th July 1914

Specific Relief Act (1 of 1877), S. 21—Valid award even though not filed is operative and all rights are merged in the award—Rights of parties are to be based only on award—S. 21 is replaced by Civil P. C. (5 of 1908), Sch. 2, para. 18.

A valid award is operative even though it has not been enforced by suit or by application under the Code of Civil Procedure. An award extinguishes all claims embraced in the submission and after it has been made the submission and award furnish the only basis on which the rights of the parties can be determined and constitute a bar to any action on the original demand, apart from S. 21, Specific Relief Act, which to some extent is replaced by para. 18, Sch. 2, Civil P. C. : 33 *Cal.* 881, *Ref.*

[P 57 C 1]

B. P. Lentaigne—for Appellant.

Ormiston and *Chari*—for Respondents.

Twomey, J.—The plaintiff firm, M. R. M. S., and three defendant firms owned and worked a certain rice mill in partnership from July 1907 to February 1909, when they sold the concern. The plaintiff firm sued the other partners for an account. One of the three defendant firms, R. M. N., was allowed to join as co-plaintiff and the Court granted a decree for accounts against the other two partners, the R. M. A. R. and M. L. M. firms. Costs were calculated on the assumption (entirely gratuitous) that each of the plaintiff firms was to get Rs. 4,000 at the final settlement, and it was ordered that the total amount of costs should be borne by the defendant firms, R. M. A. R and M. L. M., in the proportion of 2/3rds by the former and 1/3rd by the latter.

There were disputes between the partners in the first year of working, 1907-1908, and they submitted the matters in dispute to a panchayet of Chetties who went into the accounts and made an award in May 1908. Up to that time the R. M. A. R. firm had been the managing partner and kept the accounts. But the award directed that the plaintiff firms, R. M. N. and M. R. M. S., should take over the mill as from the date of the submission to arbitration. The award was carried out. The payments directed by it to be made by each firm were made. The R. M. N. and M. R. M. S. firms took over and managed the mill up to the time of the sale in February 1909. The evidence also shows that there was some distribution of profits during the period of the management by R. M. N. and M. R. M. S. There is a dispute as to what became of the account books for the period prior to the arbitration. It is proved that these books were produced by the agent of R. M. A. R. firm before the arbitrators, and one of the arbitrators, Udyappa, states that he made them over to the new managers (the R. M. N. and M. R. M. S. firms) when the arbitration was finished. Udyappa is the arbitrator in whose house the panchayet was held and the accounts would naturally be with him. He does not remember who actually took the account books away; but he asked the representatives of the new managers of the mill to take them. No complaint was subsequently made that they had not received the accounts. There is every probability that the M. R. M. S. and R. M. N. firms got them, for it was provided in the award that the new managers should take over any debits and credits shown in the accounts as outstanding. From the evidence of R. M. A. R. agent, Raman Chetty (taken on commission) it appears that these outstandings were in relation to servants' wages and certain bran contracts and that all accounts with customers of the mill had been adjusted. The accounts prior to the arbitration proceedings would be required by the subsequent managers only for the purpose of ascertaining and adjusting these outstandings. Any payments made or moneys received in pursuance of Art. 2 of the award would appear in the accounts of the later managers. The later managers would not be absolved from accounting fully for their stewardship even if it were shown that the previous managers had withheld the account books dealing with the period prior to the arbitration.

In bringing their suit for an account the plaintiffs ignored altogether the settlement of May 1908. The District Court noted that the award was incapable of execution because it was not filed in Court and that it had become barred by limitation when the suit was filed in March 1910. The learned Judge treats these as self-evident pro-

positions and cites no authority in support of them. There is abundant authority to the contrary. It is sufficient to refer to the Calcutta case *Bhajahari Saha Banikya* v. *Behary Lal Basak* (1) and the rulings cited therein. There can be no doubt that a valid award is operative even though it has not been enforced by suit or by application under Sch. 2, Civil P. C. The validity of the award in the present case is not impugned and the evidence shows that it was acted upon by all parties and that the plaintiffs received benefits under it. In the words of Mukerji, J., in the above case the award extinguishes all claims embraced in the submission, and after it has been made the submission and award furnish the only basis on which the rights of the parties can be determined and constitute a bar to any action on the original demand. The award of May 1908 settles the accounts of the partnership finally up to the date of the submission, 11th April 1908. The provisions of Cl. 22, Sch. 2, Civil P. C., have been referred to and it has been contended that this clause, read with the last 37 words of the Specific Relief Act, S. 21, prevents the award from concluding the accounts up to 11th April 1908.

There is no force in this contention. What the appellants set up in bar is not a mere contract to refer to arbitration, but an actual award in which all the parties concerned fully acquiesced and which they proceeded to carry out. The award operates as a bar apart altogether from the provisions of S. 21, Specific Relief Act, and apart from the provisions of Cl. 18, Sch. 2, Civil P. C., which to some extent replaces S 21, Specific Relief Act, in relation to arbitration proceedings under the Code of Civil Procedure. It follows that the account should be taken only from the date of the submission in April 1908 and will relate only to the period of the plaintiff's stewardship. There are no accounts for the defendants to render and they have been wrongly cast in costs. I think the order of the District Court should be modified accordingly, order as to the payment of costs by the defendants being set aside. As the defendants-appellants and respondent 3 have been put to unnecessary trouble aud expense by the action of the plaintiffs (respondents 1 and 2), I would order the plaintiffs to pay the costs of the defendants-appellants and of respondent 3 in both Courts up to this stage ; subsequent costs should be a charge against the partnership estate. Pleader's fee has been calculated at 5 per cent. on Rs. 400 in the District Court. This ad valorem calculation was wrong in a preliminary decree when the amounts due to the various partners had not been ascertained. A special fee of five gold mohurs will be substituted for the amount of pleader's fee of defendant 1. In this Court the appellants paid Rs. 395 court-fee which they will recover from the plaintiffs.

The advocate's fee in this Court, to be recovered from the plaintiffs by the appellants and by respondent 3, is fixed at five gold mahurs in each case.

Parlett, J.—I concur.

K.N./R.K. *Order modified.*

(1) [1906] 33 Cal. 881=4 C. L. J. 162.

A. I. R. 1914 Lower Burma 57

HARTNOLL, OFFG. C. J. AND ORMOND, J.

Nallan Chetty and *others*—Appellants.

v.

Muthusawmy Pillai—Respondent.

First Appeal No. 150 of 1912, Decided on 8th April 1914.

Lower Burma Town and Village Lands Act (4 of 1898), Ss. 15 and 41—Civil suit is not barred between persons for right over Government land.

Sections 41 (a) and 15 (2) do not debar a civil Court from adjudicating the rights of two private persons litigating over land which is at the disposal of Government. [P 58 C 1]

J. R. Das—for Appellants.

P. D. Patel—for Respondent.

Hartnoll, Offg. C. J.—The appellants brought a suit against the respondent for a declaration that he had no right or title to or interest in a certain piece of land together with the house on it and for possession of the same. Their case is, in another suit they obtained a final decree against one Tangaperumal Pillai ordering the latter to give up possession of the properties covered by the said decree to them and that the property in suit is one of the properties included in the said decree. The respondent pleaded ignorance of whether the appellants had obtained the decree they alleged and said that he and Tangaperumal Pillai were great friends, that Tangaperumal represented to him that the land in question which was vacant belonged to him and that he (Tanga-

perumal) would make a gift of it to him as the land was of no use to him if he (respondent) cared to have it; that thereupon in the month of May 1904 he took possession of it, built a house on it and has been in occupation of the house ever since the year 1905. Amongst other grounds taken respondent alleged that Tangaperumal had no right, title or interest in the land, that it was a village site and belonged to the Government and he submitted that under S. 15 (2) of the Lower Burma Town and Village Lands Act, the question whether Tangaperumal had acquired a landholder's right in respect of the land should be referred to the revenue Court. The District Judge sent the proceedings to the Deputy Commissioner, Hanthawaddy, in order that he might determine whether the site in dispute was at the disposal of the Government or whether a landholder's rights had been acquired under the Lower Burma Town and Village Lands Act.

The Deputy Commissioner found that appellants were not in possession and he was therefore under S. 12 of the Act unable to entertain their claim to a declaration that they had acquired a landholder's right in respect of the land. The Commissioner found that Nallan Chetty had not acquired a landholder's right in respect of the land. The District Judge then dismissed the suit on the ground that he had no jurisdiction to entertain it. An appeal is now laid and it is urged that he had jurisdiction to do so. If jurisdiction is barred, it is barred under S. 41 (a), Lower Burma Town and Village Lands Act. I have just discussed the scope of that section in Second Civil Appeal No. 76 of 1913 and would hold the same in this case, namely, when two private persons are litigating over land which is at the disposal of Government, the civil Court is not debarred from adjudicating in the matter. Ch. 5, Lower Burma Town and Village Lands Act, was not relied on in this case, but S. 15 (2) was. I do not see how that section is applicable to show that the jusisdiction of the civil Court is barred. It may be probably that no such question is necessary in deciding on the rights of the parties in this case between them also, but if it does arise and will govern the case, judgment must be given in accordance with the decision of the revenue officer. I would set aside the decree of the District Court and remand the case to be heard on its merits: costs to follow the final result.

I would also give appellants a certificate to receive back the value of the stamp paid on their memorandum of appeal.

Ormond, J.—I concur.

K.N./R.K. *Appeal allowed.*

A. I. R. 1914 Lower Burma 58

HARTNOLL, OFFG. C. J. AND TWOMEY, J.

Oodayappa Chetty firm—Appellant.

v.

Ramasawmy Chetty and *others*—Respondents.

First Appeal No. 50 of 1911, Decided on 6th May 1914.

Partnership—Heir of deceased partner need not be party to suit to recover debts due to firm—Heir cannot himself sue—He can apply for dissolution and accounts and get receiver appointed for realizing debts.

When one of the partners in a firm dies, the surviving partners can sue for the recovery of debts due to the firm without making the legal representatives of the deceased partner parties to the suit. If the surviving partners refuse to bring the suit, the only remedy of the legal representative of the deceased partner lies in a suit against the surviving partners for winding-up and for an account of the partnership and in an application in that suit for the appointment of a receiver. The receiver will bring suits for recovery of debts due to the firm: 9 *All.* 486; 17 *Bom.* 6 ; 18 *Cal.* 86 and 21 *Bom.* 412 *Ref.* [P 61 C 1]

Lentaigne—for Appellant.

Bilimoria and *Chari*—for Respondents.

Hartnoll, Offg. C. J.—Appellant is the son and heir of one Chellappa Chetty, deceased. He alleges that Chellappa Chetty when alive carried on business with respondent, 4 Pallaneappa Chetty, in partnership under the mark S. O. S., that such business was carried on by their attorney Vyravan Chetty, respondent 3. A decree was then passed against Vyravan Chetty in his personal capacity for Rs. 10,552-10-0 and costs in Civil Regular No. 352 of 1906 of this Court. In execution of such decree Vyravan Chetty was arrested and brought before the Court when he deposited as security for the payment of the decretal amount a registered deed of mortgage in

favour of the S. O. S. Firm. His right, title and interest in such mortgage was sold and a sum of Rs. 17,000 was realized. After payment in full of the decretal amount in the suit there is now in judicial deposit in Civil Revision 352 of 1906 the sum of Rs. 4,460-6-0. The plaint goes on to set out that defendants 1 and 2 Muthia Chetty and Pallaneappa Chetty, claim to be entitled to attach and have attached part of the said moneys in execution of decrees obtained by each of them respectively in the Court of Small Causes, Rangoon, in Civil Revisions No. 2683 of 1907 and No. 2682 of 1907 and that Vyravan Chetty claims to be a partner in the said firm of S. O. S., that the appellant denies that Vyravan Chetty was ever a partner in the firm of S. O. S. and submits that the moneys in deposit belong to the firm of S. O. S. and that Muthia Chetty and Pallaneappa Chetty have no right to attach the whole or any portion thereof in execution of the decrees obtained by them in the Small Cause Court. Appellant goes on to allege that Vyravan Chetty is the son of Pallaneappa Chetty, defendant 4 and that Pallaneappa Chetty has failed to carry on the business of the partnership of S. O. S. or to take any steps to protect the property of the partnership and is unwilling to do so or to assist him in recovering and protecting the said property, because Vyravan Chetty is his son and because the appellant is taking other proceedings against Vyravan Chetty for breaches of trust as agent of the said firm. The share of Chellappa Chetty in the partnership is alleged to be Rs. 7,500 out of Rs. 10,000. Appellant asked that it be declared that the Rs. 4,460-6-0 in deposit is the property of the S. O. S. Firm, that Muthia Chetty and Pallaneappa be declared not entitled to attach this sum in execution of their decrees, that it be declared that Vyravan Chetty never was a partner in the S. O. S. Firm and that the Rupees 4,460-6-0 may either be ordered to be paid to the appellant or be kept in the custody of the Court until a partnership suit has been decided between him and defendant 4 Pallaneappa, or until he and Pallaneappa otherwise agree.

Vyravan Chetty and defendant 4, Pallaneappa Chetty, did not appear to contest the suit, nor have they appeared on this appeal. So the contest has been between appellant and defendants 1 and 2 Muthia and Pallaneappa Chetty. Muthia died in the course of the litigation and his legal representative, Ramaswamy, has taken his place. The suit has been dismissed by the learned Judge on the original side on the ground that it cannot be brought by appellant, because he is not a partner iu the S. O. S. Firm, but only the legal representative of a deceased partner, that his proper course would be to bring a suit against Pallaneappa, defendant 4, for dissolution of partnership and an account and to apply in that suit for a receiver to be appointed to bring the present suit against Muthia and Ramaswamy. The learned Judge has relied strongly on the case of *Gobind Prasad* v. *Chandar Sekhar* (1). That suit was one in which a surviving partner sued a debtor of the firm without joining as plaintiff the representative of the deceased partner. It was held that such a suit would lie and that the English Rule of Laws would apply. This rule is given at p. 638 of Williams on Executors in the following words: "The general rule is that the interest which a testator has in a chose-in-action jointly with another shall not pass to his executor. Yet, per legem mercatoriam, as formerly mentioned, an exception was established in favour of merchants which has been extended to all traders and persons engaged in joint undertakings in the nature of trade. But in these cases although the right of the deceased partner devolves on his executor it is now fully settled that the remedy survives to his companion who alone must enforce the right by action and will be liable on recovery to account to the executor or administrator for the share of the deceased." The point of decision is whether this rule should be applied to the present case. In the case of *Gobind Prasad* v. *Chandar Sekhar* (1) the point at issue was whether the legal representative of a deceased partner is a necessary party to a suit brought by the surviving partner. It was decided in the negative. An opposite view was taken in the case of *Ram Narain Nursing Doss* v. *Ram Chunder Jankee Lall* (2), but the same view was taken in the case of *Motilal Bechardass* v. *Ghellabhai Hariram* (3).

(1) [1887] 9 All. 486=(1887) A. W. N. 133.
(2) [1891] 18 Cal. 86.
(3) [1893] 17 Bom. 6.

In all three of these cases the meaning and effect of S. 45 of the Contract Act was considered. That section is not applicable directly to the present case as it is not one to enforce performance of a contract, but the question is whether the principle underlying it has not made such a difference in the law that since it was enacted the English rule should no longer be followed, and whether such a suit as the present is in order. O. 30, R. 4, Civil P. C., Act 5 of 1908, has settled the difference of opinion expressed in the cases which I have quoted by enacting that the legal representative of a deceased partner is not a necessary party to the suit; but at the same time S. 45, Contract Act renders it permissible for such a representative to be a party to the suit. The rule of English Law has therefore been varied in India since S. 45, Contract Act, came into force. That being so the counsel for appellant urges that such a suit as the present will lie inasmuch as appellant is interested in the property of the partnership and all persons who can have any possible interest in the moneys in dispute have been made parties. He strongly relies on the case of *Aga Gulam Hussain* v. *Sir Albert David Sassoon* (4).

This was a case in which the legal representative of a deceased partner was allowed to sue to recover sums due to the partnership by a third party making such third party and the surviving partner who would not join as a plaintiff defendant. Now as was said by Farran, J., in the case of *Motilal Bechardass* v. *Ghellabhai Hariram* (3), the Contract Act is not an Act of Procedure. It defines and declares rights and obligations arising out of contracts and obligations quasi ex contractu. The rules as to the procedure for enforcing these rights—the remedy in cases of breach of them—must be sought elsewhere; and in commenting on the Allahabad case the same learned Judge said: "Logical consistency has there yielded to long-established practice based on considerations of practical convenience. The inconvenience . . . . of altering the procedure is pointed out by Edge, C. J., in his judgment in the above-cited case of *Gobind Prasad* v. *Chandar Sekhar* (1)." In the last-mentioned case Edge, C. J., said: "The legal representative in this case would not be entitled necessarily to a moiety of the amount recovered in the action: his share of .the amount recovered would depend on a settlement of accounts on the realization of the partnership assets, and it would, in my judgment, be highly inconvenient and possibly mischievous to allow him to interfere in the realization of the assets unless through the intervention of the Court by the appointment of a receiver in cases in which such interference by the Court might be necessary." Lindley in his book on Partnership, Edn. 7, p. 350, says: "Unless all the partners have agreed to the contrary, when one of them dies, his executors have no right to become partners with the surviving partners, nor to interfere with the partnership business."

The present suit, if allowed, might not lead to any mischievous result; but that hardly seems to be the point. In the same class of suits it is expedient that only one rule of procedure should be followed, and the point is what should be the general rule. The English rule is based on grounds of common sense and expediency and it should, in my judgment, be followed. It is not as if the appellant has no remedy if the English rule be followed. He has the remedy pointed out by the learned Judge on the original side. I would therefore dismiss the appeal with costs.

Twomey, J.—According to the English law the right to sue for debt owing to the firm devolves in the event of the death of one partner upon the surviving partners exclusively: Lindley on Partnership, Edn. 11, p. 380. The executors of the deceased partner have no right to interfere in the partnership business. They represent the deceased only for purposes of account and may sue the survivors for the winding up of the firm and for the share due to the estate of the deceased: Lindley on Partnership, Edn. 11, p. 650. But they have no right to join in a suit for the recovery of partnership debts.

There would be no doubt about the application of the English rule to India were it not for S. 45, Contract Act. The effect of this section on the English rule as to the surviving partners' exclusive right to sue for partnership debts has been the subject of several decisions of the Madras High Court. The High Courts

(4) [1897] 21 Bom. 412.

of Allahabad, Bombay and Madras held that notwithstanding the provisions of S. 45 as to the devolution of joint right the English rules should still be followed to the extent, namely, that the legal representatives of a deceased partner should not be regarded as necessary parties to a suit by the surviving parties for the recovery of partnership debts: *Gobind Prasad* v. *Chandar Shekhar* (1), *Motilal Bechardass* v. *Ghellabhai Hariram* (3), *Vaidyanatha Ayyar* v. *Chinnasami Naik* (5). The Calcutta High Court alone held the contrary. *Ram Narain Nursingh Doss* v. *Ram Chunder Jankee Lall* (2). The view of the majority of the High Courts has now been adopted in O. 30, R. 4, Civil P, C., 1908, which declares that the legal representatives of the deceased partner are not necessary parties to suits brought in the name of the firm, though the English rule is relaxed in sub-R. (2) under which the legal representatives may apply to be joined as parties with the surviving partner. The Indian legislature having thus recognized the expediency of adhering to the English rule, I think we should not follow the isolated precedent in *Aga Gulam Husain* v. *Sir Albert David Sassoon* (4) in which case it was held by a single Judge of the Bombay High Court sitting on the original side that the legal representative of a deceased partner may sue to recover a partnership debt. That decision is directly opposed to the English rule which confines the executors to a suit against the survivors for an account, and allows only the surviving partners to bring suits on behalf of the firm.

It is true that sub-R. (2) (b), O. 30, R. 4, Civil P. C., allows the legal representatives to enforce any claim against the survivors. But this refers I think to a suit for an account as between the legal representatives and the survivors. The present suit goes much further. It is a suit for, inter alia, declaration of the firm's right to certain money in deposit in the Court, this money having been attached by outside creditors of one Vyravan, an attorney of the firm, whose statement as a partner in the firm is disputed and who is a son of the surviving partner. It is not only a claim against the survivors but is also a claim on behalf of the firm against outsiders who were made defendants to the suit. Such a suit can, in my opinion, be brought only by the surviving partner and if he refuses to bring it, the only remedy of the legal representatives of the deceased partner lies in a suit against the surviving partner for winding up and for an account of the partnership, in pursuance of which suit the claim against the outsiders would be enforced by a receiver appointed by the Court.

On these grounds I also dismiss this appeal with costs.

K.N./R.K. *Appeal dismissed.*

(5) [1894] 17 Mad. 108.

A. I. R. 1914 Lower Burma 61

HARTNOLL, OFFG. C. J. AND ORMOND, J.

Ma Kyaing —Appellant.

v.

Ma Shwe Thin and *others* — Respondents.

Second Appeal, Decided on 1st June 1914.

Civil P. C. (5 of 1908), S. 104 (1) (f) and (2)—Appellate order reverisng refusal to file award is not appealable.

Where a Court refuses to file an award made without the intervention of the Court and that order is set aside on appeal there is no appeal from the order of the appellate Court.

[P 62 C 1]

Maung Gyee—for Appellant.

Hartnoll, Offg. C. J. — I am of opinion that this appeal does not lie.

Ma Shwe Thin applied under R. 20, Sch. 2, Civil P. C., that an award be filed in Court. The Court refused to file the award and dismissed the application with costs. A decree was then drawn up.

An appeal was then laid to the Divisional Court. It was clearly against the order refusing to file the award, though it asked for the reversal of the judgment and decree of the District Court. The order of the Divisional Court was that the decree of the lower Court was set aside, and that there will be a decree for the plaintiff-appellant for enforcement of the award as prayed for, the costs of plaintiff-appellant in both Courts being borne by the respondents. A decree was drawn up in accordance with the order. An appeal was given from the order of the District Court refusing to file the award by S. 104 (1) (f), Civil P. C. That portion of the so-called decree of the District Court which dealt with the refusal to file the award, was not a decree, as by S. 2 (2) of the same Code a decree shall not include an ad-

judication from which an appeal lies as an appeal from an order. The decision arrived at by the Divisional Court is not expressed in correct terms. The Court should have ordered the award to be filed and then should have proceeded to pronounce judgment according to the award, and then on the judgment so pronounced a decree should have followed. The present appeal in substance is one against the decision of the Divisional Court that the award was valid and should be enforced. In effect it is an appeal against an order passed in appeal directing an award to be filed.

Such an appeal is forbidden by S. 104 (2) of the Code. That portion of the decree of the Divisional Court which concerns the order for the filing of the award clearly comes within the provisions of S. 104 (2). It is only this part of the decree that is objected to and it is not alleged that the decree is in excess of or not in accordance with the award.

I would therefore dismiss the appeal.

Ormond, J.—I concur.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Lower Burma 62 (1)

TWOMEY, J.

Ma Sein Nyun—Appellant.

v.

Maung U—Respondent.

Second Appeal No. 148 of 1914, Decided on 31st July 1914.

Transfer of Property Act (4 of 1882), S. 123— S. 123 does not apply to private partition of joint family property.

A partition of joint family property can be effected by private arrangement without an instrument in writing. The provisions of the Transfer of Property Act do not apply to such a partition: 3 *I. C.* 247, *Ref.* [P 62 C 2]

Halkar—for Appellant.

Judgment.—The defendant-appellant is the plaintiff respondent's stepdaughter and the piece of land in suit is one of the two pieces which were the joint property of the plaintiff-respondent and his wife (mother of the defendant appellant.) The plaintiff-respondent's case as set out in the plaint was that he "let out" the land to his stepdaughter, the defendant-appellant three years before the suit on condition that they should pay the Government revenue, but he charged no rent. The defendant-appellant denied the letting of the land to her and alleged that when her mother was dying about six years before the suit, there was a partition of the family property by which the piece of land in suit was allotted to the defendant-appellant while the plaintiff-respondent retained the other piece for himself. The learned Judge of the District Court was mistaken in proposing that the transaction alleged by Ma Sein Nyun was a gift which could be effected only by a registered instrument under S. 123, T. P. Act. What she alleged was a partition of the joint family property by private arrangement. There is abundant authority for the proposition that such an arrangement may be effected without an instrument in writing. The provisions of the Transfer of Property Act do not apply to it: see *Satya Kumar Banerjee* v. *Satya Kripal Banerjee* (1) and cases therein cited.

It was only on this erroneous ground that the District Court upset the decree of the Township Court. Even if the view taken by the District Court were right, it was still necessary for that Court to consider whether the plaintiff respondent had made out the case which he set up in the Township Court. As the defendant was in possession it was for the plaintiff-respondent to prove that he had a subsisting title.

As remarked by the Township Judge, none of the plaintiff-respondent's witnesses were able to speak of their own knowledge as to the alleged letting of the land to Ma Sein Nyun and the plaintiff-respondent himself gave a contradicatory story. The defendant on the other hand produced satisfactory evidence in proof of her statement that the land was assigned to her as her share of the family property.

The decree of the District Court is set aside and that of the Township Court is restored. The plaintiff-respondent will pay the defendant-appellant costs in all Courts.

K.N./R.K. *Appeal allowed.*

(1) [1909] 3 I. C. 247.

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* A. I. R. 1914 Lower Burma 62 (2)

TWOMEY. J.

Bally Singh—Applicant.

v.

Bhugwan Dass Kalwar—Respondent.

Civil Revn. Appln. No. 17 of 1912, Decided on 13th June 1913.

*** Promissory Note — No separate cause of action than insufficiently stamped note—**

Defendant though admitting execution, plaintiff cannot succeed — Evidence Act (1 of 1872), S. 91.

Where a plaintiff has no cause of action apart from an insufficiently stamped pro-note, he cannot succeed at all although he does not profess to sue on the pro-note and although the defendant admits the execution of the document. [P 63 C 1]

Bijapurkar — for Applicant.

R. N. Burjorjee — for Respondent.

Judgment.—The only argument urged before me is one that is not contained in the application for revision, namely, that the defendant having admitted that he executed a promissory note for the amount claimed, it was unnecessary for the plaintiff to produce the document in evidence and the plaintiff was entitled to a decree on the failure of the defendant to prove payment.

It is admitted that the document itself could not be admitted in evidence or acted on because it is insufficiently stamped, and it is settled law that in such a case the plaintiff can succeed only if he can show that he has a cause of action independently of the document. The law on this subject is fully discussed in the Upper Burma case *Nga Waik* v. *Nga Chet* (1) cited in the judgment of the Township Court, and it is unnecessary to go any further.

It is clear that in the present case the plaintiff has no cause of action apart from the document. The promissory-note is the contract, and S. 91, Evidence Act, debars the production of any other evidence but the writing itself. It is true that the plaintiff did not profess to sue on the promissory note. He knew that he could not do so as it is not properly stamped. But as he had no cause of action apart from it, if he got a decree on the promissory note as the District Judge points out, that would be "acting on" the promissory note in direct contravention of S. 35, Stamp Act: see the Upper Burma case *Ma Ein Min* v. *Maung Tun Tha* (2) and the rulings cited therein.

On these grounds I think the decision of the lower Court is correct. I am also of opinion that even if the decision were wrong, the case is not one in which this Court could properly interfere in revision according to the principle set out in *Zeya* v. *Mi On Kra Zan* (3). The facts and the law applicable to them have been duly considered by the lower Courts, which have come to a concurrent decision.

I have not referred to paras. 2 and 3 of the application in which it is urged that the document in question is not a promissory note at all but a mere receipt for money. This ground was not argued before me. It is a ground that apparently was never taken in the lower Courts, and so far as I can see there is no force in it. The document appears to be a promissory note as defined in S. 4, Negotiable Instruments Act.

The application is dismissed with costs.

K.N./R.K. *Application dismissed.*

(1) [1907-09] U. B. R. 2.
(2) [1887-01] U. B. R. 2.
(3) [1903-1904] 2 L. B. R. 333.

A. I. R. 1914 Lower Burma 63

HARTNOLL, OFFG. C. J. AND TWOMEY, J.

Rathna Pillay and *another* — Defendants—Appellants.

v.

N. P. Firm—Plaintiffs—Respondents.

Second Appeal No. 251 of 1912, Decided on 5th January 1914.

(a) Husband and Wife—Marriage—Cohabiting together and considering themselves partners in life does not create rights and liabilities of marriage.

Where a man and woman cohabited together and considered themselves partners in life as well as business, but were not actually married.

Held: that the tie of marriage did not exist between them, and they did not enjoy the advantages of marriage, nor were they bound by the obligations of marriage. [P 64 C 2]

(b) Evidence Act (1 of 1872), S. 115—There is great difference between acquiescence in act in progress and after completion—Acquiescence after execution of deed creates no estoppel.

There is a great difference between acquiescence in an act which is still in progress and mere submission to it after it has been completed, as such submission cannot change the past.

Acquiesence after execution of a deed by a third party does not create estoppel. [P 64 C 2]

Wiltshire—for Appellants.

Palit—for Respondents.

Hartnoll, Offg. C. J.—The respondent firm sued appellant to recover Rs. 3,050 alleged to be due on a registered mortgage dated 15th January 1905. The deed was only signed by Rathna Pillay, but it was stated that Ma Myit signed as a witness as she was unable to go to the registration office. Rathna Pillay admitted execution of the deed, but pleaded that he had paid Rs. 1,500

of the principal and all interest due up to the date of payment of the principal Rs. 1,500. Ma Myit denied knowledge of the dccument and denied that she signed it. Rathna Pillay and Ma Myit are not husband and wife, but they cohabited together. The District Court found that Ma Myit did attest the document and was aware of it physically and by the document being registered constructively. He said that though both defendants did not live in wedlock yet they considered themselves partners in life as well as business, as in the case of a Burmese family ; that they worked as partners and had a joint interest in business to carry cut which the money was borrowed. So he considered that the whole of the property comprised in the mortgage deed should be covered by the mortgage decree. He found the alleged payment of R., 1,500 not proved. He gave a mortgage decree for Rs. 3,050 costs and further interest against both the defendants.

They appealed to the Divisional Court, which found that Ma Myit did not attest the mortgage deed, and that therefore it was of no use to prove a mortgage as it was not proved to be attested by two witnesses. The Divisional Judge found the alleged payment of Rs. 1,500 not proved, and also that Ma Myit has no right to say that Rathna Pillay had no right to mortgage her proparties as the latter admitted that he bad told Ma Myit her properties were mortgaged and there was nothing to show that she had made any protest to the respondent firm. He changed the decree into a simple momey decree for Rs. 3,050 plus costs in the District Court. Rathna Pillay and Ma Myit now appeal to this Court.

The first ground that the instrument being held not to be a mortgage deed the claim should have been dismissed as barred by limitation was abandoned at the hearing.

As regards the second ground the first point for consideration is whether it is proved that Ma Myit attested the deed. Maung Shwe Tha, the writer of it, does not swear that she did. The copy of it in the registration office does not show her signature. The copy filed on the record shows that the copy in the registration office was not only copied from but compared with the original. It is certainly not proved that Ma Myit signed the deed. It cannot therefore take effect as a mortgage. Ma Myit cannot be bound by it on the ground that she signed as a witness. The ground given by the District Court for binding her, namely, that she and Rathna Pillay should be regarded as a Burmese Buddhist husband and wife is equally untenable. The tie of marriage did not exist between them. They could separate at will and there was no binding contract between them. They did not enjoy the advantages of marriage .nor were they bound by the obligations of marriage. The ground given by the Divisional Court for binding Ma Myit is also untenable. It was argued that she acquiesced after the deed was executed by Rathna Pillay. Mere acquiescence in this manner does not create an estoppel. It is not shown that by any deed or omission of hers she intentionally caused the appellant firm to believe that she had authorized Rathna Pillay to mortgage her property, and so to accept a mortgage by him of her interest in the property. There is a great difference between acquiescence in an act which is still in progress and mere submission to it when it has been completed. In this last case acquiescence cannot change the past. It was argued that there is evidence to show that both appellants took part in the negotiations for a compromise that they both agreed to pay Rs. 1,000. Even if this evidence was true it is not, in my opinion, conduct that should bind Ma Myit. She may merely have wished to save litigation for herself and Rathna Pillay. In my judgment it is not shown that Ma Myit is bouud by Rathna Pillay's action in mortgaging her interest in the properties.

Lastly it was urged in the fifth ground of appeal that Rathna Pillay has proved payment of Rs. 1,500. There are two concurrent findings of fact against Rathna Pillay and having read the evidence there is no ground whatsoever for differing from those findings. This ground was not pressed at the hearing.

There is the fifth cross-objection that remains to be dealt with. There is no good reason for not allowing the respondent firm interest on the principal of the loan against Rathna Pillay.

I would alter the decree passed by the Divisional Court and instead thereof give the respondent firm a money decree

against Rathna Pillay alone for Rs, 3,050 with interest on the principal Rs. 2,000 at the contract rate from the date of institution of the suit to date of decree and thereafter on the aggregate at 6 per cent per annum to date of realization.

As regards costs appellants had one advocate in all three Courts. In the District Court I would give the respondent firm their costs. In the Divisional and this Court I would make each party pay their own costs.

Twomey, J.—I concur.

K.N./R.K. *Decree altered.*

A. I. R. 1914 Lower Burma 65

Full Bench

HARTNOLL, OFFG. C. J., ORMOND AND TWOMEY, JJ.

G. S. Clifford and *others*—Accused.

v.

Emperor—Opposite Party.

Criminal Revns. Nos. 125-B, and 127-B, of 1913 and Criminal Ref. No. 25 of 1913, Decided on 20th June 1913.

(a) Penal Code (45 of 1860), S. 420—Directors of bank charged with cheating by inducing deposits by false balance sheet and false directors' report—Charge amended by adding words regarding subsequent conduct of bank—Amendment held not bad in law—Criminal P. C. S. 227.

Where the directors of a bank were charged under S. 420, I. P. C., with having, by means of a false balance sheet and a false directors's report, induced depositors to make deposits in the bank which was really insolvent, and the trying Judge amended the charge by adding the words "and by intentionally keeping the bank open as a going concern after it had ceased to be solvent":

Held: (1) that the amendment of the charge was not bad in law and that the accused were not thereby prejudiced in their defence;

(2) that it was open to the prosecution to prove such subsequent events and the accused's knowledge of them as part of the deceit practised and also as showing the continuance of dishonest intention on their part.

(b) Criminal P. C., S. 297—Summing up

The summing up of a Judge must be read as a whole.

(c) Companies Act, S. 145—Duties of auditors explained.

The principal duty of the auditors is to protect the shareholders and to see that the directors and the manager are issuing true balance sheets. The shareholders are therefore entitled to rely on the auditor as a check on the directors. [P 128 C 1]

(d) Penal Code (45 of 1860), Ss. 71 and 420—Three separate acceptances of deposits from three persons at different times are not parts of one composite offence.

Three separate acceptances of deposits from three persons at different times cannot be said to be parts of one composite offence under the first part of S. 71, since the dishonest intention which is the gist of the offence of cheating would be present not only at the time the balance sheet was issued but also at the time of accepting each of the deposits. [P 128 C 2]

Giles and *De Glanville*—for Accused.

McDonell and *Mg. Kin*—for the Crown.

Facts.—In this case Clifford, Strachan, and Mower were charged with cheating under S. 420, I. P. C. The charges framed by the committing Magistrate were altered by the presiding Judge as follows:

G. S. Clifford, R. F. Strachan, S. A. Mower: You are charged as follows:

Firstly—That on or about the 30th day of October 1911, at Rangoon, you R. F. Strachan, being the General Manager of the Bank of Burma, Limited, and you S. A. Mower and G. S. Clifford, being Directors of the said Bank, did by means of a false balance sheet, and a false Director's report, and by intentionally keeping the Bank open as a going concern after it had ceased to be solvent, dishonestly induced one Maung Tin Baw to deliver the sum of Rs. 5,000 to the said Bank; and that you thereby committed the offence of cheating, an offence punishable under S. 420, I. P. C., and within the cognizance of this Court.

Secondly—That on or about the 9th November 1911, at Rangoon, you R. F. Strachan, being the General Manager of the Bank of Burma, Limited, and you S. A. Mower and G. S. Clifford being Directors of the said Bank, did by means of a false balance sheet, and a false Director's report and by intentionally keeping the Bank open as a going concern after it had ceased to be solvent, dishonestly induced one John Cumming to deliver the snm of Rs. 40 to the said Bank, and that you thereby committed the offence of cheating, an offence punishable under S. 420, I. P. C., and within the cognizance of this Court.

Thirdly—That on or about the 10th November 1911, at Rangoon, you, R. F. Strachan, being the General Manager of the Bank of Burma, Limited, and you S. A. Mower and G. S. Clifford, being Directors of the said Bank, did by means of a false balance sheet and a false Director's report and by intentionally keeping the Bank open as a going concern

after it had ceased to be solvent, dishonestly induced one N. Mitter to deliver the sum of Rs. 100 to the said Bank, and that you thereby committed the offence of cheating, an offence punishable under S. 420 I. P. C., and within the cognizance of this Court.

STATEMENT OF ACCUSED 1, G.S. CLIFFORD

I took no part whatever in the preparation of the balance sheet of 30th June 1911. I signed it as a director after it had been certified to be correct by the Auditors of the Bank.

2. According to the minutes of the General Meeting, held on 16th December 1911, I stated in my speech to the shareholders that the securities held by the Bank had been scrutinized at the time of the preparation of the balance sheet of 30th June 1911 by the Auditors and the Directors. This is certainly not a correct statement, though I am unable at this distance of time to say whether it is due to an inaccurate report of what I said or an inadvertent inaccuracy on my part when I made the speech. It is the fact that I did not myself scrutinize or even inquire into the securities and no director other than myself was in Burma at that time.

At or about the time of the audit Mr. Allan asked me my opinion of the value of the assets of the Moolla Oil Company and the Irrawaddy Petroleum Company and I communicated to him the high opinion which I personally held as to the value of those assets.

3. I was not aware and I made no inquiries how the item of Rs. 6,36,000 was arrived at or what items it was composed of or of the manner in which the contingency fund had been dealt with.

4. Save as regards my firm or the companies with the management of which I was actively concerned, I did not know with whom the Bank was doing business nor was I aware of the debts which had been treated as bad or doubtful for the purpose of arriving at the available profit.

5. I was aware that Government paper of value of five lakhs had been deposited with the Bank of Bengal to secure the guarantee by the Bank of Burma of the loan to the Rangoon Refinery Company. The transaction was not however present in my mind when I signed the balance sheet and if it had been, I think that I should most probably have accepted as correct the way in which the Auditors, who must have had knowledge of the transaction, had thought proper to treat it in the balance sheet.

6. Mr. Mower took little or no active part in the business of the firm of Mower and Company, and I, as the only active partner, was very fully occupied at the time with the business of that firm. I had then and have now every confidence both in the ability and in the integrity of Mr. Strachan, the General Manager, and Messrs. Stuart, Smith and Allan, the Auditors.

7. I had previously signed many balance sheets of the bank; but never had gone into, tested or questioned the manner in which they were drawn up. I have been director of many other companies and in that capacity, signed many balance sheets of such companies, but never examined or tested the manner in which such balance sheets had been drawn up, unless I was also actively concerned as one of the managing agents of the companies in question.

8. During my absence in Europe, my brother, Charles Clifford, holding my power-of-attorney, arranged with the General Manager that the credit balance of my private current account should be held by the Bank as security for the account of my firm. When I returned to Burma I was informed of this and made no objection: but I did not desire to have the balance of my account lying entirely idle at the Bank. So I arranged with the General Manager that I might draw upon that account for the purpose of making investments, provided that securities representing those investments were deposited with the Bank as security for the account of my firm.

9. I withdrew from this account two sums of Rs. 1,809 and Rs. 9,992-12-0 to pay to share brokers in respect of share transactions. On 4th September 1911, having prior to that date withdrawn only these two sums totalling Rupees. 11,801-12-0 from my account, I deposited with share certificates of the then market-value of about Rs. 20,000, namely: 600 Burma Investments;

2,100 Burma Rivers Transports; 131 Rangoon Oils; 191 British Burma Petroleums; 1,276 Tavoy Concessions (Rs. 3 paid); 487 Mewaing Gold (Ordinary),

10. On 4th September 1911, I withdrew a further sum of Rs. 10,000 to reduce my debt to Pandaya, which debt was secured upon some of the Mergui Crown Rubbers, held in trust for the Bank subject to the payment of calls. Rs. 750 was withdrawn two days later to pay interest to Pandaya on the same loan. I tried to redeem these shares which would then have become further security to the Bank. Owing to their fall in value and further calls being made upon them, the shares had ultimately to be sold to realize the debt secured upon them.

11. Rs. 200 and Rs. 20,000 were withdrawn from the account to pay interest and principal due to the Chetty firm of M. P. A. K., secured upon 5,750 Irrawaddy Petroleums. The shares thus redeemed were immediately deposited with the Bank of Burma.

12. Small items totalling Rs. 130 appear to have been withdrawn from this account for my own private purposes. I cannot now recall the circumstances under which this was done.

13. By arrangement with me, Mower Limited, remitted through the Bank of Burma to my wife, who was in England, the sum of £60; the cost of the remittance should have been debited in the usual course to Mower Limited by the Bank and subsequently debited to me by Mower Limited. After the Bank had closed, the cost of this remittance was wrongly debited by the liquidators to my account instead of the account of Mower Limited. I am in no way responsible for this debit in my account with the Bank; it is due solely to an error on the part of the liquidators brought about no doubt by the fact that the draft was in favour of my wife.

14. As regards the Rangoon Refinery claim against the British Burma Petroleum Company, this related to the balance of the expenses of carrying on the refinery business since the date specified in the agreement for sale. It was inevitable that there should be disputes as to some items of such an account, and in my opinion, at the time, there was room for very arguable, .if not successful, dispute as to a mortgage on the tank-steamer "Wistaria" and as to items relating to the Thilwa wharf. The claim of the Rangoon Refinery Company was never in fact repudiated by the British Burma Petroleum Company and knowing, as I knew, that it would be extremely inconvenient for the latter company to have to meet such a claim at that particular juncture, I always regarded the letters and telegrams of the British Burma Petroleum Company as indicative of that company's desire to postpone payment. I knew that the Auditors of the British Burma Petroleum Company, specially appointed for the purpose, had passed the claim of the Rangoon Refinery Company (in the form in which it was thereafter preferred) as payable by the British Burma Petroleum Company and I knew that the Board of the British Burma Petroleum Company had at once modified their attitude, when threatened by the liquidators with legal proceedings.

15. I was at the time far more concerned at the present inconvenience to the British Burma Petroleum Company than at the ultimate result to the Rankoon Refinery Company. My proposal that my firm should guarantee ultimate payment of admitted items was made with a view of assisting the British Burma Petroleum Company to postpone payment of the claim to a more convenient time.

16. I am even now confident that had funds been available at the time, the claim of the Rangoon Refinery Company would have been met by the British Burma Petroleum Company.

17. That the claim was in November 1911 settled by the Bank, for the sum of £5000 was due to the enormous pressure brought to bear by the Honourable Lionel Holland and Mr. Williamson. The liquidators refused to abate their claim unless their debt to the Bank was correspondingly abated: the British Burma Petroleum Company refused to carry on unless the liability of that company was settled upon their own terms. To have refused the proposed settlement would have meant forcing the British Burma Petroleum Company inte liquidation and rendering valueless the large number of shares in that company held by the Bank as security.

18. As regards shares in the Moola Oil Co. Ltd., and the .Irrawaddy Petroleum Co. Ltd., I did not know at what value they were taken for the purpose of estimating the securities held by the

Bank. But I myself held the very highest opinion of the value of the concessions held by these companies and would not have sold any of my shares in either of companies at par. These concessions had to my knowledge been most favourably reported on by Dr. Bleeck and Dr. Porro had in the middle of the year 1911, they were generally considered of enormous value. I now consider them to be of considerably greater value than the nominal share capital of the companies.

19. When the debenture trust deed of the British Burma Petroleum Co., was being settled, I held out for an alteration in the draft Cl. 37-H, in order that the British Burma Pertroleum Co. might not be compelled to so control the Rangoon Oil Co. as to hamper it in the ordinary conduct of its business. The last words in that clause were added to meet my views and I understood at the time that they excluded (as I am sure that they were intended to exclude) from the purview of the trust deed, not only the borrowing of money by the Rangoon Oil Co., but also the pledge of its assets in the ordinary course of business.

20. So, when the Rangoon Oil Co. required further funds for the development of its property, I borrowed the required amount from the Bank of Burma in the ordinary course of business and in the ordinary course of business I gave security to the Bank over the assets of the Company. This transaction was immediately reported in the ordinary course to the London Board of the British Burma Petroleum Co. It never occurred to any party concerned and I believe it is not the fact that the power of the Rangoon Oil Co. to grant a valid mortgage was limited by a covenant entered into by the British Burma Petroleum Co. No such suggestion had ever been made until these proceedings commenced.

21. I take my share of the responsibilty for carrying on the Bank until 13th November 1911. I knew in the months of September and October that the Bank's position had been materially altered for the worse since 30th June 1911, by the contiuous heavy fall in the value of securities, but the capital and reserve funds were not exhausted and to have closed the Bank before that course became necessary would have involved the shareholders in great and unnecessary loss and would, in my opinion, have been indefensible. The position of the Bank was from time to time reported to the Directors by the General Manager and wes carefully considered. The reports that were made and my own views upon the position are clearly and truthfully set out in the proceedings of the Directors which have been put in evidence.

22. With the full approval of my co-Directors I went to Calcutta to see whether any arrangement could be made with the Bank of Bengal to relieve the pressure upon the Bank and was fully prepared to entirely sacrifice myself and my firm to ensure that result. When my mission failed I took the best expert and legal advice procurable, and was even then left in doubt as to the proper course to be pursued as regards the closing of the Bank. It was only on the way from Calcutta to Rangoon that I was able to come to a conclusion in my own mind and immediately after landing, I took action with my co-Directors to close the Bank.

23. Throughout my connexion with the Bank, I can honestly say that I have had no other object in view than the prosperity of the Bank. My firm were large holders of shares in all of the Companies, the shares of which were largely held as security by the Bank. Such shares were held by my firm not as temporary speculations but as permanent investments and were so held up to the last, and the same causes which led to the failure of the Bank of Burma have also resulted in the ruin of my firm and of myself.

24. It is absolutely untrue that I have been party to the issue of a false balance sheet or a false Directors' report. It is absolutely untrue that I was party to fraudulently keeping the Bank open after I knew it to be insolvent. It is absolutely untrue that I have committed or been party to or cognizant of any dishonest act in connexion with the management of the Bank.

WRITTEN STATEMENT OF R. F. STRACHAN.

In addition to what was stated in my written statement filed in the Magistrate's Court, I wish to say as follows:—

Rangoon Refinery Company's Loan

I regarded this loan as secured. Up to the 28th July, the Bank held a lien

over the assets of the Rangoon Refinery Company, and that lien was not given up, until the Bank obtained a transfer of the 135,000 shares in the British Burma Petroleum Company and a definite lien over the debt due to the Liquidators by that company.

I fully understood that the liquidators were spending the money borrowed from the Bank on account of the British Burma Petroleum Company and I did not hear, until late in September 1911, that the whole of the balance of the debt was likely to be disputed. I did not see any of the correspondence or telegrams except the letters addressed by or to the Bank.

I heard in conversation and knew from the letter of 27th June from the liquidators to the Bank, enclosing £ 20,000 that some items were disputed, but that was not unnatural in the case of a debt of Rs. 10,65,000 and I knew on 29th July that taking the British Burma Petroleum shares at the price of that day, namely Rs. 5-1-0. the Bank was fully secured including the five lakhs guaranteed to the Bank of Bengal, even if the British Burma Petroleum Company successfully disputed items to the extent of Rs. 5,00,000, and on the basis of the market price of the shares on 30th, June the date at which the balance sheet spoke, there would be a margin of security of Rs. 1,23,505 even if half the debt were successfully disputed.

I learned in October 1911 that it was suggested to release the liquidators from all but £ 5,000 of the debt and I at once went-into the matter and put up my note of 27th October 1911 (Ex. 25), to the Directors in which I called their attention to the seriousness of the position.

The subsequent release of 10th November 1911 (Ex.72g) was arranged by the Directors and not by myself.

Apart however from any questions of security, I always thought up to the time of the release that the liquidators' debt to the Bank was absolutely good. The Company had gone into liquidation solely for the purpose of selling its undertaking on very advantageous terms and I to the end regarded the Company in liquidation as a substantial concern.

My letters to the liquidators of 16th May 1911 (Ex. 75h and 5th June 1911, (Ex. 75b) were written by me for the purpose of pressing the liquidators. I knew that they were asking the British Petroleum Company for payment and I thought these letters would cause them to press their demands more urgently.

Rangoon Oil Company.

I looked upon the letter of lien of 8th July 1911 as a valid security for this loan, I knew of nothing which precluded the Rangoon Oil Company from charging their assets. Before that lien was given, the Bank held a promissory-note executed by the Rangoon Oil Company and Mower & Company, and at the date of the lien a fresh promissory-note was taken from the Rangoon Oil Company. The lien was subsequently released upon the British Burma Petroleum Company giving their guarantee for the payment of the debt.

Aung Ban Oil Company.

In this case too, the Company had gone into liquidation under the same circumstances as the Refinery Company, and I looked upon the debt as absolutely good. The Bank held a promissory note which I regarded as being a security for the debt.

Mower and Company, Moberly and W. J. Cotterell.

Amongst the shares lodged with the Bank against these accounts were large numbers of shares in the Moolla Oil Company and the Irrawaddy Petroleum Company and, if those shares were of their par value or anywhere near it, there was a large margin of security in each case. I was satisfied when the balance sheet was published that these shares were worth at least their nominal value. I knew that in June, sellers of Irrawaddy Petroleum shares at Rs. 121/8 had been inquired for and none found, and I also knew that shares had been actually sold at Rs. 15 and Rs. 17-8-0. From the inquiries I made I arrived at the conclusion that the properties owned by these companies were regarded as of great value. The Bank further held promissory notes for the respective loans.

Mount Pima Mining Co. Ltd.

I regarded the letter of 4th July 1911 (Ex. 15) as a valid and sufficient security for this debt. Mower Limited and

Mower & Co. were the sole creditors of the Mount Pima Mining Co. Ltd. Mr. Allan, the Auditor, was one of the liquidators of that company. I discussed with him the value of the company's assets and he informed me that this debt could be taken as secured, as he thought the assets would realize sufficient to pay off the amount of the Bank's claim.

Attia.

From my knowledge of the position occupied by this man and of the businesses with which he was connected I was satisfied that he was solvent and able to pay his interest and any unsecured balance of his debt. He was trading with his own ship to the Nicobar Islands. He was building river steamers and was associated with influential business people in oil and mining concessions. He was half-proprietor of the Delta Navigation Company; Managing Agent for the Madaya-Mandalay Light Railway and for Oils and Minerals limited and also for the Eastern Navigation Trading Company; Shamuddin Oil Company, Burma Wolfram Company, Limited. He was also the owner of the Pioneer Flour Mill which had cost him close on Rs. 3,75,000. According to my judgment at that time he appeared to be in a large and flourishing way of business and I had no reason for thinking that he either would not or could not pay his debts.

Other Accounts.

Of the remaining accounts referred to in Ex. 13b, the following were taken as either doubtful or bad, the principal and interest being provided for in contingencies, namely:

J. A. A. Caunter, W. C. Dennis, W. Gorse, W. Gorse and Rajh, P. Teehan, Michael, Maunder, N. P. L. S. P. Chetty, I. Rajh, J. Reid, D. Rajh, Rangoon Mandalay Trading Company, P. N. Stathacopulos and Fraser and Stephen. Those accounts, taking both principal and interest, amounted to Rs. 2,93,271-15-1, whereas the total sum standing to the credit of the contingency fund in the balance sheet was Rs. 2,94,992-15-4. I may add that I did not agree with the Auditor that it was necessary to provide as much, but I subordinated my opinion to his.

As regards the profit and loss account the matter was dealt with as follows:

	Rs.	A.	P.	Rs.	A.	P.
Gross amount credited during the six months.				6,10,109	9	7
Before arriving at the sum shown as gross income in the profit and loss account there was deducted from this for contingencies	71,229	14	10			
and for bad debts	13,670	1	4			
				84,900	0	2
Leaving the amount shown as gross income at ...				5,25,209	9	5

The result was precisely the same as if this Rs. 71,229-14-10 had been placed originally to an interest suspense account. As regards the balance I considered each account and honestly thought I was justified in expecting that the interest would be paid. Each of the other accounts was also taken into consideration separately by the Auditor and I answered all questions and gave all information for which he asked.

Exhibit 18*a*.

I have dealt above with the principal accounts mentioned in this exhibit. I need not deal with the other accounts shown in that exhibit in detail, inasmuch as the figures shown in the audit papers are practically the same as those put forward by the liquidator.

Against every debt owing to the Bank, with the exception of debts to the amount of about Rs. 5,000, there were held promissory notes or other securities and I thought then, and still think, that, so far as such debts were considered good, the Bank would have been justified in law under the Acts, in showing them under the heading of "Debts considered good for which the Bank holds bills or other securities." The Auditor and I thought however that it would be fair to show the sum of Rs. 6,36,280 under the heading of "Debts considered good for which the Bank holds no formal security," that being the amount by which the value of securities were short of principal and interest after deducting the amount provided in contingencies.

The provision of Rs. 2,94,992-15-4 insured that the Bank could not lose to that extent and I thought there was nothing improper in leaving that amount under the first heading above referred to. It was not to my mind a matter of deducting that sum from the second heading and adding it to the first, but a matter of how much it would be fair to deduct from the first heading and show under the second in order to show to what extent payment of the debts was not insured to the Bank either as being actually covered by security or by provisions made by the Bank itself. My opinion was that Rs. 6,36,280 should be so shown and the Auditor agreed with me. The addition of the words "including contingencies" on the liabilities side of the balance sheet was made by the Auditor without any suggestion from me and the matter being, to my mind, a technical one for the Auditor to decide, I did not question the addition.

With reference to the absence of a note stating that five lakhs of Government paper was lodged with the Bank of Bengal as security for the Bank's guarantee of the Refinery Company's debt, the amount of the guarantee being included in "Acceptances on behalf of customers" on the liabilities side of the balance sheet, it never occurred to me that such a note was necessary and I did not even discuss the question with the Auditor. Had the question been raised, I should certainly at that time have expressed the opinion that no such note was required.

I wish to add that the Directors took no part in the preparation of the balance sheet. They were not consulted by me either as to the figures to be placed therein or as to the way in which those figures should be shown, nor did they endeavour to exercise any influence over me as to these matters. I told them that the balance sheet was correct and I believe that they accepted it relying npon the Auditor and myself for its accuracy.

As regards the carrying on of the business of the Bank after 30th June I repeat what I stated in my written statement in the Magistrate's Court. It is alleged that the object of keeping the Bank open was to get additional deposits to be used in improper ways. In fact, the total amount held by the Bank on current, savings bank and fixed deposit accounts on 13th November 1911 was less by Rs. 4,23,792 than it was on 30th June 1911, while between those dates the value of the Government paper held by the Bank was increased by Rupees 2,00,000.

THE WRITTEN STATEMENT OF S. A. MOWER.

I deny that I advised or influenced my wife to withdraw her money from the Bank. I have been particularly careful not to influence her in the control of her separate property. I adhere to the statement made in the lower Court. I have nothing further to add.

(After hearing the evidence and hearing the advocates for the prosecution and the defence, his Lordship summed up the case as follows:)

CHARGE.

Twomey, J.—Gentlemen of the jury, —It is nearly eight weeks since you were empanelled for the trial of this case, which is perhaps as important and at the same time as intricate as any case in the history of the Chief Court. It would be difficult for me to speak too highly of the patience and attention with which you have followed these lengthy proceedings and of the personal sacrifices which you have made in attending the Court for so many days. I feel confident that you now have a thorough grasp of the main facts of the case and questions which you have to decide. Several questions of law have been raised on which it will be my duty to instruct you, and in the course of summing up the evidence, I shall have to express my opinion, more or less strongly, on the principal questions of fact. On questions of law, you have no alternative but to accept my decision; but where the question is one of fact you must always remember that the duty of deciding it rests with you alone. Though I may tell you what strikes me as a resonable conclusion from the evidence on any particular point, you are not bound to agree with me in my opinion, but you are at perfect liberty to form your own judgment. I am exceedingly glad that there are several gentlemen on the jury with an intimate knowledge of banking and accounts, men who are specially competent to deal with the difficult questions of banking practice and procedure that have arisen in the case. It relieves

me of much anxiety to know that the decision of the case rests with men of business who will be able to apply ordinary business standards in weighing the evidence and the probabilities. It is also a great source of satisfaction to me that the three accused have been so very ably defended. You have been addressed for several days by the learned counsel for the defence and I think there is no point and no argument to be urged in their favour which has not been laid before you fully and clearly. Whatever may be the result of the case, I think the accused persons will at any rate be unable to reproach their advocates with want of skill or want of zeal in their defence.

ORIGIN OF THE PROSECUTION.

Now, I will say a few words as to how this case came to be instituted. The accused, Mr. Mower and Mr. Clifford, were Directors and the accused, Mr. Strachan, was the Manager of the Bank of Burma, and a balance sheet with Directors' report was issued over their signature on 4th August 1911 for the half-year ending 30th June. This balance sheet represented that the Bank had earned a large profit during the half-year and out of this profit, it was recommended by the Directors that a dividend at the rate of 7 per cent. per annum should be paid to the shareholders; that is, the same rate as in the previous half-year and I think in the half-year before that also. It is beyond dispute that the position of the Bank, according to this report and balance sheet, was sound and prosperous. The Rev. Mr. Cumming on reading the report and balance sheet thought that the Bank must be exceedingly prosperous. Mr. Black, an experienced banker, says that the balance sheet appeared to him sound and satisfactory. The balance sheet was certainly calculated to create public confidence in the stability of the Bank and to lead depositors to believe that their money would be safe if they placed it in the Bank. Less than three months afterwards the affairs of the Bank had come to such a pass that, without assistance from outside, the Bank must close its doors. The Directors applied to the Bank of Bengal for assistance, and as that Bank could not see its way to give the desired assistance, that is to say, could not accept the proposal to take over Mower & Co.'s loans aggregating some 45 lakhs of rupees, the Bank closed on 13th November: it was then clearly impossible to carry on any longer. A large number of deposits were falling due in November and there was good reason to believe that all deposits would be withdrawn: a feeling of uneasiness about the Bank was abroad; the shares of the Bank were falling and a run on the Bank was imminent. The Manager and Directors realized that it would be impossible to issue a favourable balance sheet for the half-year ending 31st December 1911.

It is clear that the continuous fall in the value of the securities lodged with the Bank had a good deal to do with the collapse, but the mere fall of securities was not sufficient by itself to account for it, for the fall in securities was a phenomenon that affected other Banks also. At any rate the striking contrast between the prosperous outlook of the Bank as represented in the balance sheet of 30th June and the report issued with the balance sheet and the actual state of affairs after such a short interval, gave rise, after the closing of the Bank, to an inquiry as to the truth of the statements and the figures in the balance sheet and report, and the present prosecution is the result of that inquiry. It is alleged by the prosecution that the balance sheet and Directors' report were false and fraudulent to the knowledge of the Directors and Manager; that instead of making a profit, the Bank had in reality suffered a loss during the half-year; that if the truth were known about this a run on the Bank would have inevitably followed, and that the accused persons issued the balance sheet and kept the Bank open with the object of deceiving the public and concealing the true state of affairs on 30th June—rather I should say on 4th August—the date on which the balance sheet was issued. The closing of a bank is an event that gives rise to all sorts of comments in the press and among the public. It is now 17 months since the Bank of Burma closed and during that time the conduct of the Directors and Manager, their motives and intentions, the policy by which they were guided, and the causes of the collapse of the Bank—all these matters have been the subject of gossip in clubs, hotels, and other resorts. Also, when a Bank fails

the air is filled, with the lamentations of the unfortunate people who have lost their money and the atmosphere generally is not likely to be friendly or even fair to the management of the Bank. We know from the evidence in this case that the general attitude towards the Directors and Manager was one of resentment, not to say hostility. This being so, the learned advocates for the defence were certainly right in warning you to free your minds from all prejudice, and I cannot too strongly impress upon you the importance of doing so. You should clear your minds, as far as you can, from anything you may have read in the newspapers, or heard spoken outside about this case. You are to deal with it in the light of what you have seen and heard in this Court and to discard everything else. The materials for your decision are the evidence that has been put before you and the inferences you can draw from that evidence, as reasonable and sensible men of business. It is only common justice to the accused that you should base your decision on these materials and on nothing else.

THE OFFENCE CHARGED.

It is perhaps hardly necessary for me to remind you also that the accused are not on their trial for mismanaging the Bank or for dealing imprudently with its affairs. You may have formed opinions adverse to the accused on this score, but however imprudent their management may have been, that is not a matter which should influence your decision at all. It is not part of the charge that the accused mismanaged the affairs of the Bank. The charge against the accused is briefly that, by means of a false balance sheet and Directors' report and by keeping the Bank open as a going concern after it had become insolvent, they deceived certain specified persons and dishonestly induced these persons to deposit their money in the Bank with the result that they lost their money or the greater part of it. Three persons are picked out from the mass of depositors because the law does not permit of more than three charges of the same kind to be tried jointly in one trial. Strange as it may seem, to issue a false balance sheet does not by itself constitute a substantive offence under the Indian law. It is an offence under S. 74, Companies Act, not to issue a balance sheet at all; the Directors are bound to issue a balance sheet and if they fail to do so, they are liable to a fine under that section, but there is no specific offence of issuing a balance sheet, knowing it to be false and fraudulent. The prosecution were, therefore, obliged to have recourse to that part of the Indian Penal Code, which deals with cheating. Cheating is defined in S. 415, I. P. C. (reads it). That is the general definition of cheating; but you see that it includes some kinds of cheating that do not concern us at all in this case. The whole of the latter part of the section, for example, has nothing to do with this case at all; the part about intentionally deceiving the person and so on, that is not germane to this case at all. We are concerned only with the kind of cheating which is described more fully in the later sections of the Code which makes it a punishable offence to cheat, and thereby dishonestly induce the person deceived to deliver any property to any person. The accused are charged with cheating in this way the three depositors named in the charge sheet.

This kind of cheating, that is cheating by dishonestly inducing the delivery of property, is of course included in the general definition which I have just read, but the law regards it as an aggravated form of cheating and therefore provides for it in a separate section which is S. 420. The only part which concerns us is the first part: "Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, * * * shall be punished" and so on (S. 420). You will see that the elements of the offence are that the accused has deceived some person and that the accused has thereby dishonestly induced the person deceived to deliver property to any person. The word "property" includes money and the word "person" includes a company such as a Bank. Thus the offence is committed if the depositors named in the charge or any of them have been deceived by the accused and have been dishonestly induced by the deceit to pay money into the Bank. But it is very necessary to explain to you that the word "dishonestly" in this section or in the Penal Code generally is not used in its loose popular sense but is strictly defined in the Penal Code and I will

read the definition to you (read S. 24). You see, he must do that with the intention of causing wrongful gain to one person and loss to another person. Then the words "wrongful gain" and "wrongful loss" also have a technical meaning as used in the Penal Code (read S. 23). The word "unlawful" there is not defined in the Penal Code, but there can be no doubt, I think, that it applies to such a case as the issue of a false balance sheet to the public and that a Bank which obtains money in that way is not legally entitled to it.

If the Bank obtained money by issuing a false balance sheet, then that gain would be wrongful gain. But you will observe that in the definition of "dishonestly" the intention of the doer is an essential ingredient. A man's act may cause wrongful gain or wrongful loss but it does not necessarily follow that he is dishonest if it was not his intention to cause the wrongful gain or wrongful loss: so that, in a case of this kind, you have to determine whether the accused had the dishonest intention that the law expressly requires. Now a man's intention is something hidden in his mind and the only way to discover the nature of his intention is to observe his external acts, words and conduct. You have not only to look at what he did and said but you have to consider also what must have appeared to him at the time to be the natural consequence of what he said and did. From these observations and considerations, you can determine by inference what was his intention in saying or doing it for a man is presumed by law to intend the natural and ordinary consequences of his acts. Thus take the case alleged by the prosecution against these accused —the case of a Bank weighed down by a large amount of debt which there is little or no prospect of realizing. The Directors and the Manager in these circumstances conceal the true state of affairs by issuing a false balance sheet representing the Bank to be in a sound and flourishing condition, and they keep the Bank open and continue to invite and receive deposits for over three months, just as if everything was in order, and in consequence of this action of the Directors and the Manager, members of the public deposit money, all of which they lose by the failure of the Bank soon afterwards.

If such were the circumstances—I am, of course only now putting the prosecution case in a purely hypothetical form —it would be right to presume that the Directors and Manager intended to cause wrongful loss to depositors and wrongful gain to themselves, which loss and gain resulted as the natural consequence of their acts. It matters not what the motive was. Motive and intention are two different things. In the hypothetical case which I have just put to you, the motive might be to enable the Bank to prevent the collapse of a number of commercial ventures in the success of which the Bank or the Directors of the Bank were more or less directly interested. There would be nothing necessarily improper in such a motive but if wrongful gain or wrongful loss is intentionally caused, it matters not what the motive was. The motive does not affect the criminality of the act or series of acts concerned. It therefore comes to this. You cannot find the accused guilty of cheating as charged unless you are satisfied that the balance sheet was in fact false to the knowledge of the accused; that the natural result of publishing this balance sheet and keeping the Bank open was the payment of money into the Bank by depositors, and that in the circumstances of the case the depositors would, as a natural consequence, lose their money or part of their money. You will remember that I altered the charge by adding certain words "intentionally keeping the Bank open as a going concern after it had ceased to be solvent." The reason for this addition is that the publication of the balance sheet alone did not complete the inducement to depositors. Even if the balance sheet were false, there could be no cheating unless the Bank was kept open afterwards. The balance sheet was published in August 1911, but the last of the three payments did not occur until the 9th November. The balance sheet therefore was before the public throughout the intervening period and the feeling of security engendered by the balance sheet and Directors' report was operative up to the time of the last of the three deposits in November. During all this time, the Bank kept its doors open for the receipt of deposits, among other things. If the purpose of issuing that balance sheet was to deceive the public

as contended by the prosecution, the action of the management in keeping the Bank open was a necessary factor in the execution of that purpose. In other words it may be said according to the prosecution that the Bank was kept open in pursuance of a design of which the first overt act was the issue of a false and deceitful balance sheet.

Meaning and Purpose of Balance Sheets.

Now, the Bank was a company incorporated under the Companies Act and limited by shares. The Act prescribed the form of balance sheet of which you have copies. It is laid down in the Act that the balance sheet is to contain a summary of the property and liabilities of the company, arranged under the heads appearing in that form or as near thereto as circumstances admit. The Act requires a balance sheet to be published yearly but in the Articles of Association framed for this Bank under the Act, it is further provided that a balance sheet shall be published half-yearly and you may take it that the provisions of the Companies Act regarding balance sheets apply fully to this balance sheet of 30th June 1911. I should tell you that the provisions about issuing balance sheets are contained in the part of the Act which relates to the "Protection of Members," that is, shareholders. The balance sheet is intended by law to be a correct summary of the company's financial position so that all who have relations with the company may have means of knowing how the company stands financially and whether it is safe to deal with it. I should also point out that a Bank balance sheet is not necessarily a true balance sheet merely because it sets forth correctly the totals of the different accounts in the bank. It would be no safeguard to the public unless it showed with reasonable fidelity the true state of affairs in general terms. Thus, if credit were taken in the books for assets which did not exist, or if the assets were grossly overstated in the books and transferred with arithmetical correctness to the balance sheet with the effect of inflating the assets by large fictitious sums, then the balance sheet would be a false balance sheet, though it might be in perfect agreement with the books of the bank.

You have seen many balance sheets in the course of this case and it is evident from these that the prescribed form is not strictly followed in practice—there are wide departures from it—for example, the assets side of the prescribed form has a heading "doubtful and bad debts." But though probably every Bank has some doubtful or bad debts included amongst its assets, you will search for them in vain in the balance sheets. They are there but only in a veiled form being included among the debts considered good. We have the opinion of several expert accountants that this course is unobjectionable but with this important proviso, viz., that the bad and doubtful debts are fully reserved against on the liability side of the account. That proviso is essential; for example, the Bank of Burma admittedly had some Rs. 2,94,000 doubtful or bad debts which they showed among the good debts on the assets side but on the liability side they included a secret reserve or contingent fund for about the same amount—I believe it is a few hundred rupees more than the actual amount of the bad or doubtful debts. No dishonesty whatever can be imputed to them for reckoning these doubtful or bad debts as good assets as they reserved against them on the liability side. In doing this they were merely acting according to the recognized practice of bankers and auditors all over India. But if the doubtful or bad debts are not reserved against on the liability side, then the Bank is bound to show them specifically as doubtful or bad debts on the assets side, and if there is a special reserve fund for doubtful or bad debts on the liability side—but this reserve is not sufficient to cover the whole of the debts known to be doubtful or bad—then the difference, that is, the excess of doubtful or bad debts, must be disclossd expressly as doubtful or bad debts on the assets side. This appears to be common sense and we have Mr. Meugen's authority for it and his opinion agrees with the other expert accountants who appear as witnesses in this case.

In the prescribed form of balance sheet, you will see that the primary division of debts on the assets side is entered as "Debts which are considered good" and "Debts which are doubtful or bad: that is the main line of division. Then "the debts considered good" are subdivided in heading 6, "For which the company

holds bills or other securities" and 7, "For which the company holds no security." There has been some doubt as to which of the good debts should go under heading 6 and which of them under heading 7. Heading 6 seems wide enough to cover any kind of security. Even the sole promissory note of a debtor is a security though it may be a security of a very attenuated kind. The Act does not distinguish between high class security and security which may be called merely nominal security. Moreover, it might be permissible to include under the first head a debt for which security is held, however much the security may have depreciated for the debt will still be a debt for which the company holds bills or other securities, that is to say, the depreciated security is still available for the whole debt although the security when realized may not yield anything like the amount of the debt. But if it is still a good debt—that is the main point—then it could properly remain under head 6. In short, whatever the views of auditors on this subject may have been, the Act does not require that the good debts entered under heading 6 should be good debts which are fully secured.

Mr. Holdsworth and I think Mr. Tanner construed the heading in this way. They thought, the debts to be placed under heading 6 should only be debts which are fully secured; but I think they are wrong. It may be that the legislature intended that only debts which are fully secured should be put under heading 6, but we cannot consider what the intention of the legislature may have been except in so far as the intention is expressed in the words of the enactment. We must look at the actual words, and in this case I think the plain meaning is, that any debt for which there is security may go under heading 6 and not merely fully secured debts. You will see, gentlemen, that in my opinion, at any rate, there was no obligation under the Companies Act to show the good debts fully secured separately from those which are not fully sesecured. But from Mr. Allen's and Mr. Meugen's evidence, it appears that auditors generally have decided for themselves that the classification of good debts in subdivisions 6 and 7 of the prescribed balance sheet is misleading and therefore a practice has grown up among auditors in India of showing under heading 6 only fully secured debts or the fully secured portions of partially secured debts. This has been the usual practice of bankers and auditors for some time and it appears as a matter of fact, from the Manager Mr. Strachan's written statement in this case and from the Auditor Mr. Allen's evidence about the balance sheet of 30th June, that they distributed what they treated as good debts between headings 6 and 7 on these lines, that is to say, they put those parts of the debts which they considered secured under heading 6 and those parts which they considered unsecured under heading 7. But it is obvious, gentlemen, that we could not hold the Manager and Auditor blameworthy if we find that some of the debts under heading 6 are, as a matter of fact not fully secured and should under their scheme have gone under heading 7. So long as the whole of the debts are good debts and so long as some security is held for the debts under heading 6, there would be no reason to find fault.

You may think that the safeguard afforded by the publication of a balance sheet will be much weakened if a Bank is at liberty to put under heading 6 a debt for which it holds any security, even a promissory-note of a debtor, or however much the security may have depreciated. But, as a matter of fact, the really important safeguard is not in the subdivision of good debts into secured and unsecured but lies in the main classification of debts into good debts and debts which are doubtful or bad. If a debt is really a good debt, it matters not to the Bank or to the public whether the certainty or practical certainty of recovering it depends upon the fact that specific security is held sufficient to recover the full amount of the debt or whether, as often may be the case, the certainty of recovery depends upon the high financial standing of the borrower. Of course, if the debt is classed as a good debt because actual securities are held of a value equal to the full amount of the debt, and if these securities afterwards depreciate or cease to be available, then it becomes a question not of transferring the unsecured portion from heading 6 to 7, but of transferring it from heading 6 to 8 "Doubtful and

bad debts." It behoves the management of the Bank in each case of that kind to consider whether they have sufficient reason to consider it as a good debt any longer, having regard to the depreciation or extinction of the security. That appears to be the crux of the whole matter. I am not going to lay down a definition of a good debt in the abstract, it is not a term of law: it is a business term and it is for you as men of business to apply what you regard as the proper business term and it is for you as men of business to apply what you regard as the proper business standard, in deciding on the evidence before you, whether any particular debt is good or not. If a debt is not good, it follows that it is either doubtful or bad and here you will bear in mind that the question whether a particular debt should on its merits be classed as good or not, would often be a matter upon which opinions might honestly differ. Where there is room for such an honest diffrerence of opinion no Bank official could be blamed for taking the more favourable rather than the less favourable view. It lies upon the prosecution when they say a debt is doubtful or bad to prove it strictly to your satisfaction and if you think, after considering all the circumstances, that there is still room for an honest difference of opinion as to the classification of any particular debt, you should take the more favourable view rather than the less favourable. But I need hardly say there are cases also in which there is no room for any such difference of opinion: cases in which no reasonable man could honestly hesitate to class a debt as other than doubtful or bad.

Now, gentlemen, in what respects is it contended by the prosecution that this balance sheet is false and misleading? We have spent a good many hours in hearing opinions and arguments about the omission of a note in the balance sheet about the pledge of five lakhs of the Government paper to the Bank of Bengal and about the way in which the contingent fund of Rs. 2,94,000 has been manipulated. I use the word "manipulated" here in no bad or sinister sense. As to the question of Government paper, I think the general effect of the evidence is that while it would have been better to mention the matter prominently in the balance sheet, yet there was no positive obligation on the Bank to show it and we have good authority for saying that it may not have even occurred to the Manager or Auditor that an express disclosure of the fact of this pledge was called for. I will not weary you by recalling in detail what each of the expert witnesses has said on this topic. The whole of the evidence has been printed and is in your hands. I think I have stated generally the effect of the expert evidence on this point. It appears that whatever the man in the street may have thought, at any rate a man versed in accounts would not think that the whole of the 15 lakhs of Government paper on the assets side were free from liability, seeing that there were nearly five lakhs on the other side of the balance sheet which are noted as "secured per contra." In my opinion the worst that can be said of this matter is that if the balance sheet were otherwise false and deceitful, the omission of a note about the pledge of Government paper would to some extent tend to assist the fraud which was contemplated. On the other hand, if the balance sheet is otherwise true and honest, then the omission of the note about the Government paper has no sinister significance whatever. Then Mr. Holdsworth laid great stress upon the method adopted by the Bank in dealing with the contingency fund or secret reserve for doubtful and bad debts which amounted to Rs. 2,94,000 and is included in the item of 118 lakhs on the liability side. His opinion was that the amount of the doubtful and bad debts for which the contingency fund was reserved should have been shown under head 7 and not under head 6 on the asset side.

Now in this balance sheet the amount of the doubtful and bad debts is included in the heading corresponding to No. 6, that is, 116 lakhs odd. The effect of this, according to Mr. Holdsworth, is to make the balance sheet more attractive by reducing the figure of unsecured debt from Rs. 9,36,000 odd to Rs. 6 36,000 odd and correspondingly increasing the figure of secured debts from 113 lakhs odd to 116 lakhs odd. This opinion of Mr. Holdsworth is, no doubt, based to some extent on his assumption that heading 6 " debts considered good for which the company holds bills and other securities " can lawfully include nothing but

fully secured debts but this assumption, I have already held is erroneous. I think, gentlemen, in view of the evidence of other expert Bankers and accountants, we have no alternative but to reject Mr. Holdsworth's opinion on this point. It appears that having provided Rs. 2,94,000 for bad debts in the secret reserve, no exception can be taken to the way in which those debts were shown on the assets side. Mr. Meugens gave us his opinion that according to the strict reading of the prescribed headings 6 and 7, the Bank would be justified in showing the whole of their debts under heading 6 and nothing under 7, always assuming that they had some security for all the debts and that all the debts could honestly be considered good debts with the exception of Rs. 2,94,000 which was specifically provided against. I have given this my most careful consideration and I have come to the conclusion that Mr. Meugens' opinion on this point is correct.

So that now, we have come to close quarters with the fundamental issue in the case, and that is, whether the balance sheet is false in taking credit as good assets for a large amount of debts which could not honestly be considered as good debts and in crediting to profit and loss and treating as earned income divisible as profit, a large amount of interest on these doubtful and bad debts on which interest was unpaid and which there was no reasonable prospect of recovering.

Before I go any further, I think, I had better comment on the protest which was made by the learned counsel for the defence to the effect that we have no right to deal with the question whether the principal of these debts was good or not. The learned counsel for the defence contends that the prosecution has all along impugned the balance sheet only on the grounds that unearned interest was dishonestly put to profit and loss, that the contingency fund of Rs. 2,94,000 was dishonestly dealt with and that the omission of a note about the five lakhs of Government paper was dishonest. They say that to impugn the action of the Bank in treating the principal of the debts good assets, is to introduce fresh matter of which the accused had no notice and which they were not prepared to meet. I confess that these arguments took me by surprise and I think they lack substance and reality. It is true that a good deal of time has been consumed in hearing evidence and arguments about the contingency fund, Rs. 2,94,000 and the five lakhs of Government paper, matters which, as it now appears, are of comparatively minor importance. But what has been the essence of the charge against these accused from the outset? Has it not been that they dishonestly declared a large profit and distributed handsome dividends when there was in reality no profit at all but a serious loss? What does that mean if it does not mean that they reckoned as good assets a large mass of doubtful and bad debts? How can it be supposed that the only question raised by the prosecution with regard to the debts is that the Bank showed as secured what they should have shown as unsecured? If a debt is really good, it is a matter of small consequence to include it in one subdivision of good debts rather than in the other subdivision of good debts. The main thing about it is that it is a good debt, whether it is good by reason of the security held or by reason of the unquestionable capacity of the debtor, apart from any specific security. The expert witnesses have been questioned not only as to the necessity of putting interest on doubtful or bad debts, to an interest suspense account, but they have also been questioned as to the necessity of making special reserve provision against the principal of such debts and as to the necessity of showing them expressly as doubtful or bad debts if no such provision is made.

It has never been suggested by the prosecution that a debt which is merely unsecured must necessarily for that reason alone, be treated as a doubtful or bad debt to be provided against, as regards the principal in a special reserve fund and as regards the interest in a suspense account. What the prosecution have contended all along is that we have here a large mass of unsecured debts which having regard to the circumstances of the debtors as disclosed in the oral and documentary evidence, could not honestly be treated as good and should therefore have been reckoned as doubtful or bad, that it was wrong and dishonest to show a large profit on the strength of such debts and that it really amounted to paying profits out of the moneys of the

depositors. It is for you to say whether the prosecution have established these contentions to your satisfaction.

Mr. Holdsworth prepared a tentative balance sheet, Exs. 39 and 39 (a), showing the position of the Bank on 30th June according to his view. In that balance sheet he did not divide the debts into those considered good and those which are doubtful or bad. He divided them only into secured debts and unsecured debts. But though he did not divide the unsecured debts in his balance sheet into good debts and doubtful or bad, it is our duty to consider this matter as an essential part of the case and to decide it according to the materials at our disposal.

The prosecution, it should be noted, have not contended that any debts should be shown specifically as doubtful or bad in the balance sheet if they are reserved against on the opposite side. The contention is that a large amount of doubtful or bad debts which is nowhere reserved against has been included among the good debts.

I would also say that it does not lie on the prosecution to show that a debt is absolutely bad. It is sufficient for the purposes of this case if it can be shown that a debt is so seriously doubtful that it could not honestly be treated as a good debt, that is, without at the same time providing for it in a special reserve or otherwise on the liability side of the account.

I will now ask you, gentlemen, to refer to the detailed statistics about loans and interest which have been submitted by the prosecution. They are contained in Exs. 18 (a) and 18 (b). Will you kindly refer to this and Exs. 13 (a), (bb) and (c) and Ex. 13 (dd)? These exhibits give in tabular form the result of Mr. Holdworth's examination of the accounts of the Bank as it stood on 30th June. It has been shown that Ex. 18 (a) is not entirely free from inaccuracies, but the mistakes in it, such as they are, have been brought to your notice and corrected. The defence have prepared a similar statement, Ex. LL, which gvies practically the same figures as are contained in Mr. Holdworth's statement except that a value is given to certain shares which Mr. Holdsworth treated as valueless; but in all other respects I think the figures and information given in Ex. 18 (a) have been adopted in the preparation of defence statement, Ex. LL. I think you will agree with me that the errors which were brought to light in Ex. 18 (a) are not errors of any serious consequence, that is to say, they do not materially affect the inferences to be drawn from the printed statements. Mr. Giles went so far as to say that this statement of loans and overdrafts is not admissible in evidence because it is not a correct abstract and because it is not made up from the books of the Bank. I admitted the statement in evidence and you must assume I admitted it rightly. Mr. Holdworth's evidence shows that besides comparing it with Ex. 18, which was the original statement presented in the Magistrate's Court, he also checked it with the audit papers and security register as regards the security. It is not disputed that it shows the amounts of the debts correctly.

In the important case of Mower & Co.'s debt the nature and number of shares in Ex. 18 (a) correspond with the information given to the Official Liquidator, Mr. Holdworth, by Messrs. Mower & Co., in Ex. 92 (a); and Messrs. Mower & Co.'s account is the most important account of all. Ex. 18 (a) is open to criticizm on the ground that it does not show some securities which Mr. Holdsworth considered as valueless — promissory notes cf debtors and joint promissory notes in a few cases, the personal guarantee of Mower & Co. in the case of Attia, and one or two other securities to which Mr. Holdsworth found that he was unable to assign any definite value. I think it would have been better if he had put in every kind of security even those he thought worthless; but we know by now what those securities are and we are in a position to consider all these securities along with those shown in Ex. 18 (a). As regards the mistakes which were brought to notice in Ex. 18 (a), I am not surprised to find that mistakes have been made. Even in Ex. LL for the defence, it was necessary for Mr. Allen to go into the witness-box and explain some mistakes which he made, and I think the mistakes in Ex. 18 (a), such as they were, bona fide mistakes and have been put right. The work of compilation was difficult and intricate and it would be surprising if the result was free from errors. Mr. Holdsworth

seems to me to have performed his task, on the whole, with care and skill. He was under our observation in the witness-box for a number of days and it appears to me he acquitted himself creditably. We may not accept all the opinions that he expressed but I think there can be little doubt that he held those opinions in good faith. As to the facts and figures about which he gave evidence, I think you may rely upon him as a trustworthy witness, but it is for you, gentlemen, to form your opinion on that point. You will remember that he was a stranger to the Directors and Manager; he had no previous business with them or with the Bank before he undertook the work of liquidator. He seems therefore to have approached that task with an independent mind. It has been urged against him that he afterwards adopted a partisan attitude and that he neglected to consult the Directors and Manager of the Bank as freely as he might have done in order to obtain explanations of facts which he thought suspicious. It is also urged that in his joint report with Mr. Ferguson, and in his affidavit to the civil Court, he gave the results of his investigation in a way which was prejudicial to the accused; that he omitted to mention facts which told in their favour especially as regards the contingency fund and as regards Mr. Mower's absence in Rangoon for some months before the day he signed the balance sheet. The liquidators' joint report is not in evidence. So I need not refer to it. As regards the affidavit to the civil Court that is in your hands, I think it must certainly be said, that it is a brief for the prosecution and gives the Court little or no information on matters which the Court ought to know with regard to the defence.

But Mr. Holdsworth may well have expected that the Directors and Manager would have an opportunity of replying to the affidavit. As a matter of fact, it appears that the defence was not gone into in the civil Court; but that apparently was not the fault of Mr. Holdsworth. On matters of opinion, as I have said, I mean opinion on questions of accounts and audits, you must compare Mr. Holdsworth's evidence with the evidence given by other experts, some of whom are men of greater weight and experience than Mr. Holdsworth. They do not agree with Mr. Holdsworth's positive views about the five lakhs of Government paper and about the contingency fund. His opinion that the balance sheet is false was formed at an early stage of the investigation and is based partly at any rate on assumptions, which are shown to be doubtful, if not erroneous, I mean the assumptions the omission of the note about the five lakhs was necessarily dishonest or that the good debts are required by law to be divided into fully secured and unsecured and that the bad and doubtful debts reserved against in the contingency fund should have been included under head 7 and not under head 6. His views on all these points have been examined and it is found that they do not hold water, and those views of his may well have prevented him from looking too curiously into facts which might tell in favour of the accused and may have led him to adopt too suspicious an attitude from the beginning. But, as I have said before, as regards the facts and figures brought to light by his investigation of the accounts and correspondence of the Bank, you have to decide whether he has set out the results of his investigation fairly and correctly before you in the printed statements and in his evidence. My own view is that he has done so to the best of his ability. If he has extenuated nothing, he does not appear to me to have set down aught in malice.

ALLEGED BAD DEBTS.

Now, gentlemen, it cannot be contended and the prosecution have never contended that the whole of the debts shown as unsecured in Exs. 18 (a) and 18 (b) ought to have been taken as doubtful or bad debts in the balance sheet. Ex. 18 (a) must be read with Ex. 18 (b). In the former credit is given only for the quoted security, but Ex. 18 (b) shows the unsecured balances of the various debts, after giving credit not only for the quoted securities but also for the unquoted shares except Moola Oils and Irrawaddy Petroleums. The total deficit of security as shown in Ex. 18 (b) is Rs. 33,68,000 odd and it includes a number of minor debts which Mr. Holdsworth regarded as good debts and which there is no sufficient reason to classify as otherwise though they are not fully secured. You may put a mark G against them. These are

B. N. DAR, ... A. LL. ...
Valdi High Court
SRINAGAR (Kashmir)

the unsecured portions of the debts of Bartlett and Bartlett, Halliday, Hicks, Ko Maung Gyi, Minnit, Mandalay Trading Company, Solomon, Smith, Browning and Browning, C. Clifford, Swales and Pullar. I am at present dealing with the smaller debts. You must add to these the debt of Fraser and Stephen, which though it was taken as doubtful by Mr. Allen, has since been paid up in full. The total of these unsecured minor debts according to Mr. Holdsworth is about half a lakh. Then the total of Rs. 33,68,000 also includes some Rs. 2,94,000 reckoned as doubtful or bad at the audit—these are the debts of Caunter Gorse and Rajh, Michael, Gorse, Maunder, N. T. L. S. P. Curppen Chetty, D. Rajh, J. Reid, I. Rajh, Stathacopoulos, P. Teehan; and against these doubtful and bad debts, there was as you know a sufficient secret reserve in the balance sheet. Well, if you deduct the amount of the secret reserve and the half lakh of minor good debts from the total of Ex. 18 (b) there remains about 30 lakhs in round figures. This figure of 30 lakhs however includes the Rangoon Oil Company's debt of Rs. 7,90,000 odd and I think I had better deal with that debt before going any further. Mr. Holdsworth told us that he treated it as a good debt though he thought the security for it was worthless. He treated the interest on this debt as having been actually paid. Well, it is a matter of comparatively little importance whether there is security for a debt or not, if it is a good debt. I have already explained this point fully. It is therefore a work of supererogation to examine the question of security for the Rangoon Oil Company's debt. But I may say that after giving the matter the best consideration I could, I have come to the conclusion that the lien* given to the Bank by the Rangoon Oil Company Directors on 8th July 1911 constituted a valid charge notwithstanding the covenant in Cl. 37 (h), of the Trust Deed of British Burma Petroleum Company. The Rangoon Oil Company was not a party of that Trust Deed and the covenant could not bind them in any way. It is true that the lien, being a hypothecation of moveable property, was liable to be defeated by a subsequent encumbrancer who obtained possession. This presupposes that the Rangoon Oil Company would commit fraud by giving a subsequent lien, which, as a matter of fact, they did not do. You may think that the men who in their capacity as Directors of the British Burma Petroleum Company made the covenant with the trustees for debenture-holders were guilty of sharp practice afterwards in giving the lien to the Bank in their capacity as Directors of the Rangoon Oil Company. But, if there was sharp practice, it was sharp practice with which we have nothing to do in this case. It is clear enough that the British Burma Petroleum Company regarded the lien as a valid lien, and that they had to exercise pressure on the Bank in November in order to procure the surrender of the lien by undertaking on their part to repay the money due by the Rangoon Oil Company to the Bank. So, if from the figure of 30 lakhs you deduct the Rangoon Oil Company's debt, Rs. 7,90,000, there is a residuum of about 22 lakhs which, according to the prosecution, the Bank had no right to include among the good debts in the balance sheet.

This sum of 22 lakhs odd is made up principally of five large items aggregating Rs. 19,81,500. The figures are as follows:

		Rs.	a.	p.
Attia	...	3,62,500	0	0
Mower & Co.	...	7,52,700	0	0
Mount Pima	...	1,38,300	0	0
Aung Ban	...	1,67,200	0	0
Rangoon Refinery Co...		5,60,800	0	0
The total of these five large debts, I think, you will find to be...		19,81,500	0	0

Then there are 11 smaller items which it is necessary to refer to and which you may call deficiencies on smaller debts:

		Rs.	a.	p.
Major Meagher	...	38,600	0	0
Britto	...	1,200	0	0
W. H. Clifford	...	1,500	0	0
Cotterell	...	59,900	0	0
Moberley	...	82,900	0	0
Murray	...	4,600	0	0
Peters	...	11,700	0	0
Sevastopolo	...	5,600	0	0
Tsounas	...	4,500	0	0
A. Stephen	...	61,800	0	0
Buckingham	...	2,400	0	0
The total amounts to...		2,74,700	0	0

But you should straightway strike out Murray's unsecured debt of Rs. 4,600,

* Exhibit 20.

1914 L. B. 11 & 12

because his debt was shown at a later stage of the trial to be, though unsecured, a good debt. It is admitted to be so by the prosecution. Well, excluding Murray, the total of these minor debts is Rs. 2,70,100, making when added to the five large items, a sum of about 22 lakhs which, according to the prosecution, should have been shown as doubtful or bad. I will deal first with the five larger debts amounting to Rs. 19,81,500. The materials you have for deciding whether any particular debt is a doubtful or bad debt are various. You should have, of course, to take into account the actual value of the debtor's security on 30th June and the proportion that the value of this security bore to the amount of the whole debt. In some cases, but not in all, you have information as to the length of time for which the debt has been outstanding and the length of time during which the interest on the debt remained unpaid and there is evidence as to what payments, if any, have been made to each account. Part of the evidence is contained in Ex. 13 (a) and the connected exhibits and there is also a good deal of evidence in Mr. Holdsworth's deposition as to the various accounts. Then you have to consider whether the debtor was good to fill up the deficiency of the security and if not whether it can be said that his financial standing was such that further security could reasonably be dispensed with. It seems to me that a debt to be a good debt should be recoverable or realizable within a reasonable time ; but that, of course, is for you to decide yourselves. What is a reasonable time will vary with the circumstances of each case. These are matters entirely for you to determine on the evidence, whether the debts or any considerable portion of them alleged by the prosecution to be doubtful or bad, were really doubtful or bad to the knowledge of the accused on 1st August 1911 when they signed the balance sheet.

As I said before, it is not necessary for the prosecution to prove that the debt is absolutely bad. It is sufficient to show that it is seriously doubtful, but I should add that it is not sufficient for the prosecution to throw a vague suspicion on a debt. It is not sufficient for them to "hint a fault" and leave us to presume that the debt is doubtful. You must remember that there should be really serious ground for classifying a debt as doubtful, for one to go the length of reserving against it and putting the interest on it to an interest suspense account, and it is only where the prosecution have established the existence of such reasons to your satisfaction, that you should treat a debt as doubtful. In the case of each debt that I will now deal with, I will try to draw your attention to the chief considerations relied on by the prosecution for holding that it is a doubtful debt, leaving you in each case to decide whether the evidence as to its doubtfulness is really sufficient. It is in this matter that your business experience and knowledge of the world will be of the greatest use to you.

Attia's Debt.

First, there is the debt of Attia, Rs. 3,62,500, that is the unsecured portion of the debt on 30th June. The total of his debts as shown in Exs. 18 (a) and 18 (b) is Rs. 10,48,642. Deficiency in quoted security was Rs. 8,08,752 but if the unquoted shares be taken at full nominal value, then the deficiency in Attia's account is still over three and half lakhs. It has been urged that the prosecution is bound to prove that the unquoted securities were worth no more than their par value, i. e., the prosecution should have shown that they were not worth more than the full nominal value. As to this, gentlemen, I think, we may safely assume that the Auditor who took them at par value did not undervalue them. I think that it is a legitimate assumption. Moreover, it appears to me that the Auditor looked askance at these unquoted shares. His letter of 1st August shows this : Ex. 30. He mentions that the security consists largely of unquoted shares. This was one of the points which caused him uneasiness. I think we are safe in assuming that these unquoted shares, if they were worth their full nominal value, certainly were not worth more on 30th June, and their full nominal value has been given to them in Ex. 18 (a), leaving as I said in the case of Attia's account an unsecured balance of three and half lakhs.

This balance was recognized at the time of the audit to be unsecured and it also appears that the Auditor thought it not only unsecured but doubtful because he wrote the word "doubtful," at first and then crossed it out on Mr. Strachan's as-

surance that Attia was all right. You should refer to Mr. Strachan's written statement and Mr. Allen's evidence about Attia's financial standing in Rangoon at the time. This is what the accused Mr. Strachan says about Attia (read his written statement re Attia). Mr. Allen was justified in accepting the Bank Manager's opinion as to the financial position of a debtor of the Bank. But though he accepted this opinion, he still seems to have entertained some serious misgivings about Attia's debt, for this 3 1/2 lakhs, the unsecured portion of Attia's debt, is the principal item in the Rs. 6,36,000 which was taken as unsecured at the audit and you will remember that in his letter of the 1st August, written three days after he signed the balance sheet, he wrote to the Directors and recommended that the interest on most of the unsecured loans, i. e., the interest on most of the Rs. 6,36,000 should go to an interest suspense account, if credited at all, and should not be taken as profit. Does not that mean that Mr. Allen thought Attia's debt to be doubtful in spite of Mr. Strachan's assurance?

Mr. Meugens told us, if you consider it necessary to put the interest on a debt to interest suspense accuont, that presupposes that the debt is a doubtful debt. So that Mr. Allen apparently when he wrote that letter of 1st August still thought that the word "doubtful" which he had crossed out against Attia's unsecured balance should not have been crossed out, i. e., that the word ought to have been restored. That seems to me the legitimate inference from the letter of the 1st August. There were certain receipts from sale of security which were credited to Attia's account during the half year amounting to Rs. 23,000 odd. Mr. Holdsworth told us that after the 30th June only Rs. 175 was credited to his account. Of course, in addition to the securities for Attia's debts shown in Ex. 18 (a) there was also a guarantee by Mower & Co. which Mr. Holdsworth omitted to show in Ex. 18 (a). The value of this security depends entirely on the question whether Mower & Co.'s own account was good at that date. If as a matter of fact, you find that Mower & Co. had a large unsecured balance which they were not in a position to pay up to the Bank, then the value of their guarantee of Attia's unsecured balance would be nil.

In considering Attia's financial position, you will, of course, have regard to the letter of the 17th October, Ex. 84 (a), which was referred to by Mr. Rutledge yesterday. That letter certainly seems to show that in October, at any rate, he was in very serious financial straits being practically insolvent. It does not follow, of course, that he was in great straits on 30th June or 1st August when the balance sheet was signed, but it is a fact which has to be taken into consideration in estimating his financial position a few months earlier. Of course the Manager of the Bank is supposed to be conversant with the financial affairs of the borrowers of the Bank and the fact that Attia in October, so soon after the balance sheet was issued, was in this difficult position, is a point for your consideration. It is also to be remembered that Attia had some years before been intimately connected with Mower & Co. and had been a partner in Mower & Co. itself. The state of this debtor's affairs would probably be known to the Directors and Manager of the Bank in a general way. They would be likely to follow the fortunes of such a debtor as this with special interest. Of course, the offer contained in the letter, Ex. 84 (a), was not accepted by the Bank; it was only mentioned as showing the position of this debtor so soon after the time at which Mr. Strachan considered him to be in a flourishing financial position.

Mower and Co.'s Debt.

The next large debt on this list of five is the debt of Mower & Co., Rs. 7,52,700 that is the unsecured portion of the outstanding loans and overdrafts on 30th June as shown in Exs. 18 (a) and (b). Mower & Co. were the principal debtors of the Bank. The total amount of their debts on 30th June was Rs. 42,78,000 which shows an increase of 1 1/2 lakhs since the 1st January. In quoted securities, the deficiency is Rs. 26,56,000, but deducting unquoted security, the deficiency is reduced to about 7 1/2 lakhs. But this takes no account of the large number of Moola Oil Company and Irrawaddy Petroleum shares which were put in by Mower & Co. as further security for their outstanding loans. As regards other unquoted securities as I have already said

I think we are entitled to assume that they were not of any higher value at the time of the issue of the balance sheet than the value assigned to them at the audit. That is to say, that they were not worth more than the nominal par value. I will now deal with the question of the Moola Oil and Irrawaddy Petroleum shares. You have been told, and it is apparently correct to say, that if the liquidator put as low a value as Rs. 5-11 per share, the deficiency of the security on Mower & Co.s' account would be fully covered. You have therefore to consider whether the prosecution has satisfied you that these shares which were deposited for Mower & Co.'s account were really worth nothing like 7½ lakhs, the amount of deficiency of this account. By the Liquidator, Mr. Holdsworth, they are called mere prospecting companies and he has been taken to task for disparaging them by the use of this expression. But the Bank Auditor, Mr. Allen, seems to have referred to them in terms which were hardly more respectful. In his letter of 1st August (Ex. 30) he expressed his misgivings about the loans which could not be easily realized and mentioned inter alia "loans on the security of certificates of prospecting companies." You have been referred to the balance sheets, lists of share holders and the original agreements which led to the formation of these companies, Exs. 59 (b) to (f) and 60 (b) to (g). I do not think I need refer to them any further. The facts about these companies will be fresh in your memories.

I think the documents show, at any rate, that the description of the Moola Oil Company and Irrawaddy Petroleum Company as prospecting companies is not very inaccurate. There was an enormous number of shares but no paid up capital, the shares being vendors' shares and it appears that their only substantial asset at the time of the formation of the companies was the right conferred by the prospecting licenses to search for oil on certain demarcated blocks in Upper Burma. It is true that if the property really yielded oil in paying quantities, these companies .would make a good thing out of it, for they had got the Rangoon Oil Company and British Burma Petroleum Company who were already working in this neighbourhood on their own property, to exploit their territories for them on the basis that the Rangoon Oil Company and British Burma Petroleum Company would pay whatever royalty was due to Government and over and above this royalty, would pay further royalty to these companies. Everything depended on oil being obtained in paying quantities but whether oil could be got in such quantity seems to me to be a matter of pure speculation. The geologist's reports had been favourable, but such reports are by no means infallible and it by no means follows that oil will be found merely because you get indications of oil. There are strong indications of oil in the Minbu mud valcanoes, but it has not been found possible to work them as a commercial proposition. Government has marked off into square mile blocks a large area in Minbu and adjacent districts which from their geological conditions, may be expected to yield oil but it is always a matter of pure speculation whether if you bore on any given block you will get oil in paying quantities.

As to the actual state of affairs of these two companies on 30th June we have the evidence of a man from the spot, Mr. Kirk. Extracts have already been read to you but perhaps I had better read the principal parts of the evidence again. (Read from examination-in-chief: "I know the territories of Moola Oil Company and the Irrawaddy Petroleum Company shallow wells.") That is, as regards the Moola Oil Company: you see it was worked by the British Burma Petroleum Company only and all that they knew about it is that it had a shallow test well which they said had the smell of oil. Then as regards the Irrawaddy Petroleum Syndicate, Mr. Kirk says that both companies were working on this territory and that the Rangoon Oil Company started the work in November 1909. (Read from "the Rangoon Oil Company started work sunk no other wells after July 1911)." Then he says further down "at the present time the yield of both territories is 150 —200 barrels a day." Then he says the British Burma Petroleum Company also worked on this block (18 S.). (Read from "the British Burma Petroleum Company began to it was a delayed well)." So that in June or July 1911, no oil had

been struck in the Moola Oil Company territories, and as regards the Moola Oil Company, the position was that the Rangoon Oil Company had made one unsuccessful attempt to bore a well and had dug a second well which was yielding 40 to 50 barrels a day, and in respect of this well difficulties were encountered in the shape of water breaking into the well which had to be cemented off. As regards the Moola Oil Company territory, it was said in cross-examination there was only a smell of oil in the hand-dug well, and that it was an extremely good indication to get oil in such a hand-dug well (read from "I am pretty sure . . . . . down any deeper"). Then we are told that the British Burma Petroleum Company had entered into a contract with a contractor for drilling in this particular block and also the British Burma Petroleum Company had paid some royalty to the Moola Oil Company in respect of oil taken in this block over and above the Government royalty, and the Moola Oil Company runs no risk of the expenses of unsuccessful wells. They are in the same position as well-owners in Yenangyaung. If oil is won, the Moola Oil Company gets the profit; if no oil, there would be no loss. Then we are told that the Moola Oil Company owned a block adjoining 19-P, and had struck oil on that block before the development of 19P began, but in a different sand than the one which was struck in 19-P.

The prosecution say, that is no indication that oil will be found in 19-P. Then it also appears that when the Rangoon Oil Company struck oil in 18S, the Burma Oil Company hurried up rigs on the southern boundary of 18S and started drilling, so as to get the benefit of this oil. The nearest well was about 860 or 900 feet away from the Rangoon Oil Company's well that struck oil and the oil that was struck in 18S was at a depth of 700 feet which was very satisfactory. Mr. Kirk says: "One is apt to meet . . , . . does not detract from the value of the oil well." It appears to me that it must detract from the value of an oil well if you have to go to the expense of cementing off the water. Then we are told by Mr. Kirk that a million gallon tank was put up to take the oil from this block and that a pipe was made, two or three miles, from the fields to the river bank. All I can say to you is that the construction of the tank and pipes showed great optimism on the part of the company looking to the indication of oil shown in Mr. Kirk's evidence. I call your special attention to Mr. Kirk's evidence; of course, a great deal depends upon it and you should read it carefully before you decide this point. It is one of the most important depositions in this case. You have to consider on that evidence whether the territories were proved oilfields in June-July 1911 or whether they were still in the initial speculative stage. My own opinion is after hearing Mr. Kirk's evidence, that they could not be called proved oilfields and that if anyone gave a subtantial price for the shares of these companies on the strength of the indications that there were at that time, he was a speculator whose optimism would amount to mere foolishness but that is a matter entirely for your decision and not for mine. It may be of course that exaggerated rumours were spread in Rangoon and that the result of these rumours was to cause the isolated purchases of the shares as to which evidence has been given by -Mrs. Smith and Mr. Ady. Mr. Ady says that he sold 100 Irrawaddy Petroleum Company shares at Rs. 17-8-0 a share some time before May 1911 when no oil at all had been found on the Irrawaddy Petroleum Company territories. Still we are told they were sold at Rs. 17-8-0 a share.

Mrs. Smith says that 100 Irrawaddy Petroleum Company shares were sold for Rs. 12 per share: no records were kept of this transaction. The Rangoon Gazette of 3rd June published a list showing that there were buyers of Irrawaddy's Rs. 10 shares at Rs. 12-8-0. As regards the Moola Oil Company shares, the only transaction is apparently the sale of 100 shares at Rs. 10 in September. I gather there was no transaction up to the time the balance sheet was issued. It seems to me there was very little justification, if any for these prices and it is of course a significant fact that about this time Mr. Ady and Moola Dawood went to London to try and float a company in connexion with these territories. It would be a very good thing to have definite transactions in shares to point to in Rangoon and that is a fact which you cannot overlook in consider-

ing whether these transactions were really genuine or not. There were no transactions at all on the stock exchange. Such transactions as are mentioned in evidence were all outside the Stock Exchange. As I said before, Mr. Allen thought it was to some extent a blemish on the shares that they were not quoted on the Stock Exchange. If he did not think so, why should he refer to this fact in his letter of 1st August where he mentions that many of the securities are : "Shares for which there is no market quotation." Of course, it suits the purposes of the defence to dismiss the Rangoon Stock Exchange with a shrug of the shoulders calling it a coterie of superior gentlemen. But it is nevertheless the principal market of the largest city in Burma and it is a place, where as a matter of fact, we find business done on a considerable scale in all the well-established oil companies. It would perhaps not be right to go so far as to call the outside transactions, hole and corner transactions, but at any rate, without disrespect to the ladies and gentlemen who carry on business as outside brokers, it may be said, I think, that transactions outside the stock exchange which are not publicly advertised do not carry the same weight as transactions on the Stock Exchange. At any rate, gentlemen, the absence of quotations in the recognized market is a fact that you cannot altogether disregard in considering whether these various transactions represent genuine dealings in these shares. You know very much more about these matters than I do and I think you must recognize that the question of the value that might properly be put on these shares on 1st August is a matter of very great importance in this case and is another matter in which your knowledge and experience will help you to come to a right decision.

My own opinion is that there were no sufficient grounds for giving any substantial value to the Moola Oil Company and Irrawaddy Petroleum Company shares on 30th June. That is the conclusion to which I have come, but you are not at all bound by my opinion on that point. A great deal has been said about Mr. Holdsworth's letter, Ex. Q, written in May 1912, to Mr. Moberley's solicitor, which has been taken as an admission that these shares had some value at that time. In fact, Mr. Holdsworth in cross-examination admitted that the letter could not bear any other construction. We know, gentlemen, that this letter was drafted by a subordinate in Mr. Holdsworth's office and not by Mr. Holdsworth himself, though he said he looked through it and signed it. It may well be that he did not consider the effect of the letter as regards these oil shares when he signed it. There is no reference in it to Moola Oil or Irrawaddy Petroleum Company shares. The object of the letter was to put the screw on Mr. Moberley and get him to pay something on account. You will have to give due weight to that letter, and you will also have to consider whether this letter is a sufficient foundation for the inference that you are asked to draw from it. The question is whether the Moola Oil and Irrawaddy Petroleum Co. shares were so valuable in June and July 1911 as to cover Mower and Co.'s deficit balance of 7½ lakhs, whether the Bank could honestly take them to be of sufficient value as to fill up such a gap as that. As regards the negotiations in London for the floating of sterling companies, we have only Mr. Ady's evidence and the copies of telegrams which have been put in, Exs. SS, SS-1. I leave it to you to put your own value on these proposals of company promoters in London, knowing as you do, better than I do, what company promoters are. You know at any rate to what a small extent the Moola Oil and Irrawaddy Petroleum prospecting territories could be considered established oilfields in June and July 1911, when these negotiations were in progress. It seems to me, gentlemen, that these abortive negotiations throw no light on the question whether these shares had any substantial value in June and July 1911.

Mount Pima Company's Debt.

I now come to the third debt on the list of the five larger debts, namely the Mount Pima Co. liquidation, i. e., Rs. 1,38,300 in Ex. 18 (a). The security for this debt is shown as letter from Mower & Co., undertaking to make over to the Bank their claims as sole creditors of the company, but Mr. Holdsworth omitted to mention that there

were also two promissory notes for this debt signed by Mower & Co. as Managing Agents of the Mount Pima Co. and also by Mower & Co. on their own behalf. The company was wound up in March, the general opinion at a meeting of the shareholders being that it was useless to attempt its reconstruction. So that company went into liquidation and since then a sum of about Rs. 46,000 has been realized by the liquidators, that is, about one-third of the amount due to the Bank. This sum I understand, has been paid to the Bank under the terms of Mower & Co's letter, Ex. 15 of the 4th July, which makes over to the Bank as security of the Mount Pima debt, their claim as sole ereditors of the company. We have no reason to believe that they were not the sole creditors. There is nothing left to be realized, I understand, but the disused ore crushing mill at Pyawbwe as to which you may refer to Mr. Allen's evidence. He was questioned at length about this mill and what use it could now be turned to. His firm has been entrusted with the liquidation and he presumably knows more about the assets which are available than anybody else. Mr. Strachan says that it was on Mr. Allen's assurance that the Bank took the debt as good.

The question for you therefore to decide is, in the first place, whether apart from Mower & Co.'s guarantee of the Mount Pima's debt, Mr. Allen or Mr. Strachan could have honestly thought that the assets of the defunct company were really worth so much as Rupees 1,38,000 odd and that this debt would be recovered. You will not overlook the correspondence about the proposal to lease the mill as a going concern to the Burma Mines Company. Ex. NN, NN-1 for the defence, which have been printed, show the correspondence on that subject, but the proposal came apparently to nothing, for it was decided in July 1911 that the mines were worthless even as a prospect: see Mr. Allen's evidence on that point. It seems to me that there are serious elements of doubt about this debt, apart from Mower & Co.'s guarantee. As regards that guarantee the value of it depends entirely on the view you take of the Moola Oil and Irrawaddy Petroleum shares which were lodged by Mower & Co. as security for their own debts, for, if Mower & Co.'s account was fully covered, then their guarantee of the Mount Pima debt was no doubt a valuable additional security and made the debt practically a good debt.

Aung Ban Company's Debt.

I now pass on to the Aung Bang Company's debt next on the list, i. e., Rupees 1,67,200. From Ex. 18 (a) it appears that no interest was paid on this debt for over twelve months. There was no security for it except the promissory note signed by the liquidators of the company. Ex. 69 (a), (e) and (b) show the correspondence of May 1911 between the Bank and the liquidators. They were warned that no further debits would be allowed on their account with the Bank. Ex. 69 (c), of the 5th June shows that the Manager and the Auditor were going to treat the debt as unsecured, as they contended that the liquidators had parted with the assets to the British Burma Petroleum Company, when the Aung Ban's undertaking was merged in that company. Then you have the letter, Ex. 11, dated 30th June 1911, which shows that the assets of the company did not cover the liabilities. The Aung Ban Company had a claim against the British Burma Petroleum Company on what is called an intromission account of the liquidators and it appears, that the auditor required a letter of lien on this claim to be obtained by the Bank from the liquidators in order to show the debt as fully secured. By an oversight, this letter of lien was not obtained and there was no security for the debt up to the time the balance sheet was issued except the liquidators' pro-notes.

As a matter of fact, it appears from Mr. Williamson's evidence that the claim of the liquidators against the British Burma Petroleum Company was settled in June 1911 for a cash payment in which a sum of Rs. 83,000 claimed by the Aung Ban Company against the Rangoon Oil Company was specifically included. This Rs. 83,000 was included as a liability by the Rangoon Oil Company in their balance sheet of 31st March 1911, but in the next balance sheet of 31st March 1912, though it was still shown on the liability side of the Rangoon Oil Company balance sheet it was shown as not admitted by that company. Well, after the money re-

cieved from the British Burma Petroleum Company in June-July 1911 had been paid to the Bank, there was left an unsecured balance of over Rs. 80,000 due to the Bank by the Aung Ban Company. The only chance of recovering any part of this balance would apparently be by suing the liquidators who had committed what Mr. Giles called the appalling error of distributing to the shareholders of the Aung Ban Company by way of dividend the 90,000 odd shares in the British Burma Petroleum Company in which the Aung Ban Company had been merged. The share holders should not have been given this dividend by the liquidators until the claims of the creditors of the company had been satisfied and theoretically, at any rate, the shareholders could be forced to disgorge the shares they had received by way of dividend. But when it comes to actual legal proceedings to accomplish this purpose, the difficulties may be so great as to be insuperable. The suit would apparently have to be against the liquidators, and unless the liquidators personally could pay up, the litigation would probably be infructuous to a great extent at any rate. It does not need a trained lawyer to see that any legal proceedings with a view to following up the actual shares into the hands of the persons who now hold them would be beset with difficulties. The shares may have changed hands many times and the chances of recovering any substantial number of them would be, to say the least, problematical. At any rate it seems to me that the prospect of recovering any considerable portion of the outstanding balance, Rs. 80,000, by this means is highly doubtful. Mr. Giles estimated that it would be sufficient if the Bank could recover 16,000 of the 90,000 shares at the present market value. But it is for you, gentlemen, in view of all the circumstances to decide whether the prospect of recovering these shares is so likely that the Bank were under no obligation to treat the Aung Ban Company's debt as a doubtful debt.

Rangoon Refinery Company's Debt.

There remains only the Rangoon Refinery Company's debt, the unsecured balance of which is taken as Rs. 5,60,800, Ex. 18 (*b*). The total debt is Rupees 12,44,000 including the five lakhs for which the Bank of Burma had pledged Government paper as a guarantee with the Bank of Bengal. The document relating to the Refinery debt are scattered all through the exhibits. I think they are about 50 in number and they are not arranged in chronological order. It was considered better to adhere to the order in which the exhibits were put in evidence in the Magistrate's Court rather than to re-number the exhibits which would cause confusion. I am not sure now, that it would not have been more convenient in the case of the Refinery exhibits to arrange them in a group by themselves chronologically. But we are indebted to Mr. Giles for going through these documents in order of date and reading out the more important parts of them in the course of his speech. I think you all noted at the time the order in which they should be referred to when you were considering them. The question of the Refinery debt was fully discussed by both Mr. Giles and Mr. Rutledge and as the main facts are fresh in your memory, I need not go over the whole ground again. I will deal only with what I consider to be the salient points in those exhibits. First, as to the security before 30th June 1911. It is true that there were certain agreements of lien on the Refinery Company' assets Exs. 21 (*a*) to (*d*). These agreements were made in the early part of 1910 before the company went into liquidation. Subsequently, when the liquidators sold the undertaking to the British Burma Petroleum Company, they sold it free from incumbrance. It has been pointed out that in the actual conveyance in December 1910 (Ex. 72h), the liquidators conveyed the undertaking free from incumbrance only as regards their own acts and conduct and that the conveyance therefore did not affect the lien given by the Company to the Bank before the Company went into liquidation, that is to say, before any liquidators began to deal with the Company. I think it is highly doubtful whether any such position could be maintained in a Court of law and this was apparently the view held by the Bank and Auditor, for they pointed out to the liquidators in May-June 1911 that the debt of the Refinery Company must be taken as unsecured.

Mr. Strachan says that these letters were written in order to bring pressure

to bear on the British Burma Petroleum Company, but I think it is at least equally probable that they expressed the view which he took of the agreements made in the early part of 1910. Subsequently on 29th July 1911 the liquidators gave the Bank a lien on any money they might receive from the British Burma Petroleum Company against which they had made certain large claims amounting, I think, to over £70,000. They also transferred to the Bank 1,35,000 British Burma Petrolem Company's shares as part security for their debt. Writing on 4th March 1912 (Ex. 21P) Mr. Clifford said that this arrangement satisfied himself and Mr. Strachan and the Auditor and they therefore treated the Refinery debt as fully secured and as a good debt. The question you have to decide is whether they were too easily satisfied, whether Mr. Clifford at any rate could honestly have been satisfied. The position was this: giving full credit for the 135,000 shares, Ex. 18 (a), you see they are given credit for Rs. 6,83,437-8-0 that is, the Rangoon Refinery's debt on the last page of Ex. 18 (a) the Bank had good security for under 7 lakhs of a debt of Rs. 12,44,000 odd. For the balance Rs. 5,60,000, they had a lien on the liquidators' claim against the British Burma Petroleum Company. Ultimately in November they released this claim accepting Rs. 75,000 in full satisfaction from the British Burma Petroleum Company. The Director, Mr. Clifford, knew in July that the claim was disputed, not a small part of it, but practically the whole. The telegram of 6th July Ex. 72 (g), from John Taylor & Sons shows this to be so. Thus Mr. Clifford knew that the British Burma Petroleum Company, after paying £20,000 without perjudice in June, disputed practically all the rest of the claim, over £70,000. It is urged that this telegram did not amount to a repudiation of the liquidators' claim and that the British Burma Petroleum Company, after sending the telegram, retreated from the position which they had taken up. Mr. Williamson's evidence shows what actually took place. The liquidators of the Refinery Company, Mr. Cotterell and Mr. Charles Clifford, were in London. Mr. Charles Clifford told the British Burma Petroleum Company's Board that if the persons acting for him in Rangoon were to know that the whole of the balance of the claim was repudiated, he would have no option but to telegraph to Rangoon to institute legal proceedings to enforce the claim. The Board then agreed to write a letter to Mr. Cotterell in London "neither too strongly affirming the repudiation nor too definitely closing the matter," in other words, they wanted to gain time. This letter was actually written on 1st August 1911 to Mr. Cotterell and Mr. Charles Clifford in London. It is Ex. 74 (e), and it has been read to you. It supports Mr. Williamson's evidence as to the extent to which the Board climbed down. But the telegram of 6th July to Rangoon was not cancelled. The only thing the Board did was to cable to Rangoon that the liquidators need not be informed officially of the contents of the telegram of 6th July, Exs. 106 and 106(a).

On 31st July Messrs. Mower & Co. wrote to John Taylor & Sons that the position as regards the liquidators' accounts was truly bad and that it was difficult to foresee what the outcome would be. This was two days after the Bank got the lien from the attorneys to the liquidators in Rangoon. It is clear that Mr. Clifford, who is the Director of Mower & Co., the agents of the British Burma Petroleum Company, as well as the Director of the Bank, knew that the whole of the balance of the Refinery claim was being disputed by the British Burma Petroleum Company. It is true that the letter of 1st August to the liquidator, Mr. Cotterell, in London shows that the British Burma Petroleum Company were anxious for delay and did not wish to run the risk of a law suit which might have resulted in the collapse of the British Burma Petroleum Company. It was a temporizing letter. But the Board did not modify their instructions to their Rangoon agents, which they sent in their telegram of the 6th July. So that matters stood practically as they were. Ultimately the Bank in November waived their claim against the British Burma Petroleum Company, accepting a merely nominal sum of Rs. 75,000 in full satisfaction, and it is explained that the Directors did this, because to refuse would have ruined the Brititish Burma Petroleum Company. And this was an important matter f

the Bank because the shares of the British Burma Petroleum Company formed a very large portion of the security held by the Bank. The Bank had some 4,00,000 of these shares and had a large holding also in the Burma Investments Company of which the principal asset was about 4,00,000 British Burma Petroleum shares. Therefore the Bank was interested directly or indirectly in the British Burma Petroleum Company to the extent of about 800,000 shares. The minutes of the Bank Directors' meeting on 1st November (p. 37 of the minutes) shows exactly what was done at a special meeting of the directors on 1st November:

PRESENT.

"Messrs. Mower, Clifford and Okeden,

It was decided having regard to the fact that the Bank of Burma, Limited, was interested to so large an extent in the Rangoon Oil Company Limited, and the British Burma Petroleum Company, Limited, that it was incumbent on the Bank to take every measure necessary to safeguard these two companies, and to meet the demand of the trustees to the debenture holders in the matter of releasing the equitable mortgages, and of otherwise putting the companies on the soundest possible position in respect of the Rangoon Oil Company debts. It was further considered necessary to secure a second signature to the bond which is available from and offered by the British Burma Petroleum Company. As to whether the Bank was placed at a disadvantage by accepting the bond referred to was fully considered, and it was unanimously considered that such was not the case, having regard to the fact that the Bank had only a second mortgage and in all respects ranked after the prior claims of the Bank of Bangal, whereas under the above arrangement the Bank secured a separate and distinct security of the guarantee of the British Burma Petroleum Company, Limited. It was resolved therefore that the Directors of the British Burma Petroleum Company and the Rangoon Oil Company, Limited, be informed that the Bank requires this arrangement to be carried into effect, it being understood that no further debts are incurred on the security of the assignable assets of the Rangoon Oil Company, Limited. In the same connexion. the matter of taking over the liabilities of the liquidators of the Rangoon Refinery Company, Limited and giving the liquidator thereof an acquittance of their debts to the Bank was considered. It was resolved that the arguments applying to the matter of the loan to the Rangoon Oil Company Limited, were equally applicable hereto, in so far as they related to the necessity of safeguarding the interests of the Rangoon Oil Company, Limited and the British Burma Petroleum Company. It was further considered that no good purpose could be answered by opposing the arrangement in that it was generally admitted, that the liquidators of the Rangoon Refinery Company, Limited, claim on the British Burma Petroleum Company, Limited, could not be made good and therefore the Bank's position as a creditor was not worth maintaining."

It appears therefore that if the Bank refused to release the claim, the British Burma Petroleum Company might have to go into liquidation and the last state of the Bank would be worse than the first. The Directors of the Bank were confronted with this unfortunate dilemma and they chose to let the Refinery claim go in order in save their British Burma Petroleum shares. It is for you to decide whether on the information before him in July, Mr. Clifford could have foreseen that this was a probable outcome of the situation, knowing as he did know that the whole claim was disputed and knowing also that the Bank could not bring any serious pressure to bear on the British Burma Petroleum Company without bringing that Company to the verge of ruin. It seems to me that such a result must have been plain to him but, it is for you to decide. If that result was visible to him (Mr. Clifford), could he have regarded the lien on the liquidators' claim as good security for the 5½ lakhs due by the Rangoon Refinery Company to the Bank over and above the value of the 1,35,000 shares? Is the security which a creditor dares not enforce a good security? Is it appreciably better than no security at all? You have to decide whether the Bank had any right to treat this deficiency of 5½ lakhs as a good debt in the balance sheet.

It is urged, of course, that as in the case of the Aung Ban Company's debt, the Bank could have recourse to the shares in the British Burma Petroleum Company, about 3,00,000, I think, which the Refinery Company liquidators had distributed as dividend without stopping to consider how they were going to pay the creditors of the company. My remarks as to the shares distributed by the Aung Ban Company's liquidators apply also to the shares distributed by the Rangoon Refinery Company's liquidators and I have nothing to add to them. There was, in my opinion only a remote possibility that the Bank could recover any of these shares. If the Rangoon Refinery Company's debt was doubtful to the extent of 5 1/2 lakhs, I do not think that it was to any material extent less doubtful on account of the British Burma Petroleum shares which the liquidators had distributed by way of dividend. I should add however that Mr. Strachan does not appear to have seen the telegram of 6th July nor Mr. Allen. So that full knowledge of the true state of affairs can hardly be imputed to Mr. Strachan though he admits, of course that he did discuss the question about the disputed claim with Mr. Clifford and it is for you to form your own opinion as to what Mr. Clifford must have told Mr. Strachan about it. That is all I have to say about the larger debts aggregating Rs. 19,81,500, but I will have to refer again later on to some of these debts in dealing with the question of crediting unpaid interest.

Smaller Debts Considered.

Then there are the smaller debts about which I have little to say, namely, the debts of Major Meagher, Britto, Clifford, Cotterell, Moberley, Peters, Sevastopolo, Tsounas, A. Stephen and Buckingham aggregating Rs. 2,70,000. As regards Major Meagher's debts, you have to look at Ex. 90, the Manager's letter of 27th June 1911, which shows that in the opinion of the Management of the Bank in Rangoon, Major Meagher's position was considered hopeless and the Manager in Madras was told to sell his stock as a going concern and realize all he could. Durwans were to be placed in charge of Major Meagher's stock. The total of Major Meagher's debts was Rs. 72,000, of which a sum of Rs. 38,000 odd was unsecured. It is admitted that this debt became bad when the Bank closed in November. The question you have to decide is whether it was bad or seriously doubtful in June. The letter, which I hav just referred to, shows, I think, that in the opinion of the Manager here it was highly doubtful at that time and what you have to consider is whether there was anything in Major Meagher's evidence to warrant a different opinion. He puts the blame on the Madras Corporation for his financial difficulties and he may be right as to this, but what we have to consider is not whether the Madras Corporation treated him badly, but whether his debt to the Bank was really a doubtful debt. He has produced a profit and loss statement for June for one month showing a profit of Rs. 2,000 on two farms that he had in Madras. There is no profit and loss statement for any other month and we have no assurance that the farms could be relied upon to yield anything like this sum as a normal monthly profit. As regards his statement of assets, we have little means of checking it, but judging from the amount realized by the Official Liquidator of the stock—I think it was Rs. 8,000 against some Rs. 40,000 or Rs. 50,000 valuation of the stock by Major Meagher—that valuation appears to have been very excessive. Major Meagher appears to be a man of a very optimistic temperament. You will have to consider how far you can rely upon his statement that he was really in a financially sound position at the time the balance sheet was prepared.

The next debt is that of Mr. Britto, a debt of Rs. 2,300. The deficiency of security is, I think, Rs, 1,200. There were no credits to this account during the half-years, but we have very little else as indications that the debt was bad or doubtful. It has been stated in evidence that Mr. Britto had a dispensary in the town and he deposited jewellery as security. This jewellery may have been sold by the Offiicial Assignee at a disvantage. On the whole it appears to me there is no sufficient ground for treating Mr. Britto's debt as doubtful. I would, therefore strike out this debt.

Then there is Mr. W. H. Clifford's debt of Rs. 5,605 for which the value of the security was Rs. 4,059. The amount, which is unsecured, is Rs. 1,546. Ex. 16

shows that he was not in a position to pay any instalments, but the amount is a small one. Mr. Clifford was in receipt of a salary from a firm and I think you might safely strike out this debt also. I do not think there are sufficient grounds for holding that it was a doubtful debt.

Then Mr. Cotterell's debt. The total debt is Rs. 1,34,247. There were no credits at all during the half-year. There is a deficiency of Rs. 80,000 on the quoted security, but he had deposited also by way of security 13,125 Moola Oil shares to cover this deficiency. It would be sufficient if these shares realized Rs. 4-9-0 each for the whole of this deficiency to be covered. It depends, gentlemen, on your decision, about the Moolla Oil shares which I have said you will have to consider very carefully.

Mr. Moberley's debt, Rs. 1,91,600. Taking the unquoted as well as the quoted securities 'Ex 18 (a)' the deficit is Rs. 82,900. There were no credits in the half-year. Mr. Moberley's pay, as Agent of the Bank in Rangoon, was about Rs. 2,000 a month and he had a free house. To cover the deficiency of Rs. 82,900 there were 30,000 Moola Oil shares and 1,000 Indian Petroleum shares. I have already referred you to the letter to Mr. Moberley's Solicitor, Ex. Q, in which it was admitted that Mr. Moberley's debt would be fully realized if all the securities were sold out and it appears that if these Moola Oil and Indian Petroleum Company shares realized as little as Rs 2-12-0 per share that would be sufficient to cover the whole of this deficiency of Rs. 82,900. As in the case of Mr. Cotterell's debt, you will have to decide the question of Mr. Moberley's debt with reference to the value which you think can honestly be put on the Moola Oil and Indian Petroleum Company shares.

Peters' debt was Rs. 36,500, the securities being Rs. 24,700. There was a deficiency of about Rs. 11,700. There were no credits in this account during the half year. It appears that at one time some years ago he was in a prosperous condition living in a fashionable part of the town and his wife was well off. He had his sons educated in England and had all along received a good salary —I think about Rs. 700 a month. It is also very probable that he did not tell us the truth about his original purchase of the Rangoon Oil Company shares. As far as the records of the Bank go, it appears that he did contribute about one-third of the amount paid for purchasing these shares, the Bank contributing only two-thirds and getting the shares as security. The question is not whether he was well-off in 1908-09, not whether the advances where originally made were properly or improperly made to him, but whether the balance due on 30th June 1911 was, as a matter of fact, good or whether it was doubtful or bad at the time. Rupees 11,700 is a large sum for a married man on Rs. 700 a month to pay up and though Mr. Peters apparently had other resources some years ago, that does not show that he is is in a position to pay this debt or that he is likely to pay it within a reasonable time. However, it must certainly be admitted that Mr. Peters was a very shifty and evasive witness and he may have resources which he did not admit. Therefore you will have to consider that point in determining what value to put on Mr. Peters' statement that he is unable to pay. You will remember also that the burden of proving the debt to be a bad or doubtful debt lies upon the prosecution.

Then as to Sevastopolo. His debt is Rs. 9,600, with security to the value of Rs. 3,900, a deficiency of Rs. 5,600. There were no credits in the half-year and there have been none since except by the sale of shares which realized a sum of Rs. 3,000. Mr. Allen says Mr. Seavastopolo is trading in coal to Calcutta and he considers his debt to be good. No interest has been paid since 1st March 1911 when his account was opened. He never paid any interest on his loan: that is an indication, of course, the debt is somewhat doubtful but it is for you to decide whether that is alone sufficient to make a debt so doubtful that it ought to have been classed as doubtful in the balance sheet. There is, of course, the negative indication that he was not so far as Bank records show called upon to furnish further security to make up the deficiency.

Next comes Mr. Tsounas' debt, Rs. 6,300 with security of Rs. 1,800, leaving a deficiency of Rs. 4,500. In this case there were no credits in the half-year, but he was in receipt of a salary from Macropolo & Co., and he was receiving

half profits as Manager of the firm. It is also to be remembered that he borrowed a considerable sum of money on a previous occasion from the Bank, which loan he paid up in full. He has given evidence here and he seems to have given a true account of his affairs as I could judge. On the whole, I should be inclind to say that in this case the Manager of the Bank might reasonably think that there was good prospect of recovering the unsecured balance.

Then as to A. Stephen's account. The unsecured balance is Rs. 61,800. He was a partner in G. Stephen & Sons. The balance sheet of the Stephen's estate (Ex. O) was drawn up by Mr. Strachan. He was the receiver of this estate up to the end of December 1910. The balance sheet shows a substantial amount to come to the partner after paying off all liabilities. But this hopeful balance sheet was not realized at all. It is said that the failure of R. Moodeliar and of Nahapiet were the chief causes which prevented the assets from being realized. With regard to this account you will have to refer to Mr. Sen's evidence (P. W. 26). He has given evidence to the effect that when the Official Receiver took over the estate in December 1910 from Mr. Strachan, the solvency of the estate was considered doubtful. If it was doubtful then, I think, it is a legitimate inference that it was more doubtful in June 1911 and Mr. Strachan, if any one, was conversant with the affairs of this estate, having himself been receiver up to a period of six months before the issue of the balance sheet of the Bank which we are considering. Mr. Sen also told us, you will remember, that the unsecured creditors of the Stephen's estate may receive one anna in the rupee. That is the position in which the Bank of Burma now stands as regards the unsecured debt due by A. Stephen.

A great deal has been said about Seymour Buckingham's account which is a very small one. The deficiency after deducting security was only Rs. 2,471. I need say very little about it. The exhibits relating to this account are Exs. 14 (a) to (f). The correspondence regarding Buckingham's composition with his creditors certainly suggests that his account with the Bank was doubtful on 30th June. I mean that there is nothing in these documents to show that the bank's debt was excepted from the composition with the creditors. It is suggested by the defence that the Bank was not a party to the composition but you will read Ex. 74 (a) to (f) and decide whether there is any reason to believe that the Bank was excepted from it. Ex. 14 (f) in particular expresses the disappointment of the manager at Seymour Buckingham's neglect to pay up in accordance with the composition arrangement. On the other hand, there is evidence for the defence that Buckingham was earning money as agent of certain firms at Singapur including the Steam Rope Manufacturing Company and that, as a matter of fact, some money is still due to him as agency commission by one or more of these companies. This debt is a very small one and I do not think I need say anything more about it.

Well, gentlemen, I have dealt with the larger debts aggregating Rs. 19,81,500 and the lesser debts aggregating Rupees 2,70,000 which together amount to over Rs. 22,00,000. I leave it to you to decide whether any considerable portion of these unsecured debts should have been treated as doubtful in the balance sheet and either shown to be doubtful or else provided for by some sort of reserve on the other side,

UNPAID INTEREST TREATED AS PROFIT.

I now turn to the question of interest. The details of this part of the case are set out in Exs. 13 (a), (bb) and (c) and there is a summary in Ex. 13 (dd). Col. 1, Ex. 13 (a), shows that on 1st January 1911, there was due a total sum of about 45½ lakhs in round figures on the accounts in Ex. 13 (a) and the next page, Ex. 13 (bb), shows over 17½ lakhs due on the accounts printed on that page. The total of these sums is 63 lakhs : it includes in round figures 3 lakhs of debts which was afterwards treated as doubtful or bad at the audit in July. You must exclude these 3 lakhs for which provision was made, both as to principal and interest in the contingency fund. But there remains roughly a sum of 60 lakhs of debt, the unsecured portion of which, according to the prosecution was doubtful or bad. Of course, the 60 lakhs represents the total debts, the secured as well as the unsecured portion. The unpaid interest,

on the whole, of these debts, the unsecured as well as the secured portions, was taken to profit and loss and treated as profit. You will remember Mr. Giles' suggestion that in the case of doubtful or bad debts which were partially secured, the Bank was entitled to take the unpaid interest on the secured portion of the debt as earned income. I think the expert evidence shows this to be wrong. You cannot split up a doubtful or bad debt for the purpose of interest into two parts, a secured part and an unsecured part.

It is only if the security is sufficient to cover the interest as well as the principal of the whole debt that unpaid interest can be taken to profit and loss and that is the system which Mr. Holdsworth has followed in preparing these statements. He has shown in these statements the interest on the whole of these debts, not merely on the unsecured portions but on the secured portions as well. There is a summary in Ex. 13 (dd) and in this summary the sum of Rs. 12,44,000, the refinery debt, is added in and its unpaid interest of over half a lakh. Rs. 53,000 is also shown. This interest was also taken to profit and loss. The total amount of interest wrongly credited to profit and loss according to this statement of Mr. Holdsworth is Rs. 2,26,000 odd. As regards some Rs. 20,000 of this amount, we need not concern ourselves for as I have said, it may be taken that provision was made for this amount of interest in the contingency fund on 30th June, that is to say, the interest on debts recognized to be doubtful or bad at the audit. If this sum of Rs. 20,000 is deducted, the balance is Rs. 2,06,000 odd and this represents the amount which the prosecution still contend, should have gone to interest suspense or deferred interest account and not to profit and loss and which should not have been distributed as profit by the Bank.

The principal items in this sum of Rs. 2,00,000 (these figures you might note down against the list I gave you of larger and smaller debts, you can put the figures in a separate column, 'interest wrongly credited to profit and loss according to the prosecution)" are against Attia, Rs. 24,500, against Mower & Co. Rs. 90,400; against Mount Pima, Rs. 6,200, against Aung Ban, Rs. 9,400 and against the Rangoon Refinery Company, Rs. 53,500. If you add up these figures you will find that the total is Rs 1,84,000. Then among the lesser debts the only figures that need attract your attention are those relating to Cotterell, Rs. 5,800, Moberley, Rs. 6,200 Peters, Rs. 2,100 and A. Stephens Rs. 5,700. These are the four larger items and I need not trouble you with the rest. The total of these four is Rs. 19,800. So that adding Rs. 19,800 interest on these four items and Rs. 1,84,000 on the five larger items you get roughly Rs. 2,03,800. That is the total of the items I have given you. To arrive at these figures 1 have followed the same course as followed by Mr. Holdsworth in calculating the figures for the table at the top of Ex. 13 (dd), that is to say, I have in each case taken the figure for total interest in Col, 6, Exs. 13 (a) and 13 (bb) and deducted from the total receipts shown in Col. 11. The net amount of interest actually debited to each of these accounts and afterwards taken to profit and loss by the Bank during the half-year is thus arrived at. In the case of the Refinery Company's debt Ex. 13 (c) looking to the state of the account and the nature of the payments, you will have to decide whether Mr. Holdsworth was justified in treating the credits in Cols. 10 and 11 of Ex. 13 (c) during the half-year, entirely as credits to the principal of the Refinery debt. I would like to remind you of what Mr. Holdsworth said about this (p. 37 of his evidence) (Read re Rangoon Refinery Company from "The whole of the interest should have been credited to interest suspense account . . . . value of the security"). That was an admission he made in answer to Mr. Coltman's question. In this case, i. e., of a company in liquidation, it depends entirely on security. Then he said in answer to a question I put to him:

"The reason why I make a difference between the Rangoon Refinery debts and other debts in Ex. 13 is that in the case of the Refinery accounts a large amount was advanced during the period (Rs. 16,06,492), and the amount received was much less (Rs. 11,20,110), and there was a large balance of Rs. 5,39,950 increase in the total balance due at the end of the period and this debt was unsecured and doubtful to a large extent at the

close of the period. In the other accounts there were practically no transactions during the period." Well, gentlemen, you must decide whether he was justified in doing that, i. e., in treating this Refinery account in this exceptional way. You have his reasons which I have read out to you and I leave it to you to decide whether they are sufficient. It is a question on which I think you will be able to form a better opinion than I could. It seems to depend a good deal on what view you take of the Refinery debt, the principal of the debt. I have already dealt with the question whether that debt could be regarded as a good debt at the time of the balance sheet. If you come to the conclusion that the Refinery debt was a doubtful debt, then I think you must decide also that the credits to this account during the half-year should have been taken only in reduction of the principal and that there was no justification for treating the unpaid interest as profit. So also as regards the unpaid interest on the other debts, those of Attia, Mower & Co., Mount Pima, Aung Ban, Cotterell, Moberley, Peters and A. Stephen. It is only if you find these debts to have been doubtful or bad on 30th June 1911, that you need consider the further question whether the unpaid interest accruing on them was properly taken to profit and loss.

The bank were, of course, entitled to reckon as profit the unpaid interest on any debt which was honestly considered to be a good debt. On the other hand, it may be said that whatever portion of the debts you find to consist of doubtful or bad debts, the unpaid interest relating to that portion of the total debts ought to have been taken to interest suspense or deferred interest account or at any rate ought not to have been treated as divisible profit in the profit and loss account. I would like to remind you of what the experts said about the interest suspense account : perhaps it is not fresh in your memory. Turn to Mr. Black's evidence on pp. 1 and 2 of his deposition (read from "taking an account which is bad . . . . . such interest would be credited to interest suspense account)." Further down on the same page he says "in my opinion the mere increase of an overdraft account . . . . . the bank was satisfied of the debtor's ability to pay." Then in cross-examination by Mr. Coltman he said (read from "regarding the crediting of unpaid interest . . . . . noted in the books or not)." Then there is Mr. Tanner's evidence, pp. 1 and 3. He says (read from: "If a debt is considered good . . . . . to be a firm of repute)." Further down he says : "Interest on bad or doubtful debts . . . . reserve for bad and doubtful.'" He also said at p. 3 of his deposition (read from : "I agree that the only object of the interest suspense account . . . . . before the account is published)." Then there is Mr. Warren, former agent of the Bank of Bengal in Rangoon, who was witness 7 for the defence. He says : "The practice of the Bank of Bengal . . . . . which the bank holds for it." Then last of all I will refer you to what Mr. Meugens said on p. 6 of his deposition at the bottom (read from "if a debt is seriously doubtful . . . . . or otherwise reserved against)." Then on p. 3 he said: "I heard Mr. Warrens' evidence . . . . . may depend on other things."

So I think there is no substantial difference of opinion among these gentlemen as to the principles which should guide a bank in this matter, no real difference as to the circumstances in which you may credit interest to profit and loss and as to the cases in which the bank ought to take such interest to interest suspense account. I think however that Mr. Holdsworth in saying that "you must have absolute certainty of recovering before you can deal with the interest as earned income" is going beyond the mark. It is unnecessary that the recovery of the interest should be absolutely certain ; the consensus of opinion among the other experts who were examined shows that absolute certainty is not necessary. It is sufficient if the manager of the bank or the directors honestly consider the debt a good debt and believe that the interest will be recovered. If they had a reasonable certainty to that extent, I think, that would be sufficient.

I think that is the effect of the evidence given by these expert gentlemen. Well, applying these principles and using the knowledge you have gained of the various debts, you have to decide whe-

ther the management of the bank could honestly treat this interest amounting to over Rs. 2,00,000 on these debts as earned income available for profit reckoning in the balance sheet. This is of the greatest importance, for you will remember that the available profit shown in the balance sheet was Rs. 1,62,000 odd and therefore the genuineness of this profit depends to a great extent on this question of unpaid interest. If as the prosecution contend, the bank had no right to credit these two lakhs odd to profit and loss, then there was no profit at all but a loss and the balance sheet was necessarily false. Even if you decide that any large portion of the two lakhs was wrongly credited to profit and loss, you will have to work out the effect of your decision as regards the net profit of Rs. 1,62,000 and see how far the aspect of the balance sheet would have been changed if that portion of the interest had been put in an interest suspense account instead of going to profit and loss. I may say that in this part of the case there is no suggestion that the prosecution have sprung a surprise on the accused.

The question of crediting unpaid interest to profit and loss has been conspicuous in the fore front of the prosecution case from the beginning. In connexion with this branch of the subject you will, no doubt, bear in mind the Auditor's letter of the 1st August 1911, in which he strongly advised that interest on most of the unsecured loans should be credited to an interest suspense account or not at all. Now, gentlemen, that advice was given before the balance sheet was issued, but after it was printed. The unsecured loans according to the bank manager and the auditor amounted to Rs. 6,36,000 and the interest on that sum was not taken to an interest suspense account in this balance sheet, but was reckoned as divisible profit. Mr. Allen says, he meant this advice of his to be applied in the ensuing half-year. But if it was strongly advisable for the ensuing half-year, it is not easy to understand why he did not insist on the same course being followed in the balance sheet for the half-year ending 30th June 1911. You will remember that Mr. Allen at first contended that provision for the interest on the unsecured debts had actually been made in the contingency fund on the 30th June 1911, and that he merely meant to convey to the Directors that it would be better in future to make provision for such interest in an interest suspense account month by month rather than to make a lump sum provision at the end of the half-year, when deciding how much was to be added to the contingency fund.

That would, of course, be a mere matter of book-keeping and Mr. Allen went on to explain to us the superiority from the book-keeping point of view of putting doubtful interest month by month in an interest suspense account rather than providing for it in a contingency account at the end of the half-year. But the next day it was shown that Mr. Allen's answers on this subject were not correct. For he was obliged to admit that, as a matter of fact, the contingency fund on the 30th June 1911 was only a few hundreds of rupees in excess of the principal and interest of debts taken to be doubtful or bad at the audit, that is to say, Rs. 2,94,000, and, therefore, it was all but exhausted in providing for these debts and their interest and, therefore, it is plain that the balance sheet of 30th June 1911, contained no reserve provision at all for the interest on unsecured loans respecting which Mr. Allen had expressed his misgivings in his letter of the 1st August to the Directors. It also appears to me from the auditor's advice on this point and from his advice about not paying a dividend that he entertained serious doubts about most of these unsecured loans, and though he does not expressly say so, his letter at any rate suggests the inference that the bank should not merely have credited interest on these loans to interest suspense account but should also have made special reserve provision of some kind for most of the principal of these debts amounting to Rs. 6,36,000. You will remember Mr. Meugens' remark, that if you say the interest on the unsecured loans should go to interest suspense account, that is tantamount to saying that these debts are doubtful. He said it presupposes that these debts were doubtful. So that we have some grounds—I do not know how substantial they appear to you to be—for thinking that as regards the Rs. 6,36,000 the bank ought to have made reserve provision not only for interest but also for principal.

It is true that there was a reserve fund of five lakhs, but no part of this fund was ear marked as provision for doubtful and bad debts and we have it on Mr. Meugens' anthority that if any part of the ordinary reserve fund is to be used for this purpose it must be expressly stated so in the balance sheet, that is to say, the reserve fund or such part of it as may be required for the purpose of meeting bad or doubtful debts should be described as a reserve for doubtful and bad debts. In the absence of such express description, you cannot include bad and doubtful debts, principal or interest, among your assets, unless of course you have provided for them otherwise by a secret reserve or contingency fund.

Comments on Auditor's Actions.

In what I have said up to now, I have dealt with the case generally and have tried to lay before you the principal considerations to be taken into account in deciding whether the balance sheet and directors' report were false and dishonest and whether the dishonesty was aggravated by keeping the bank open till November. It remains for me to deal with the case against each of the accused separately. But before doing that, it is advisable to touch upon the question how far the accused would have been justified relying upon the auditor's certificate on the balance sheet. You will have noticed that both Mr. Mower and Mr. Clifford in their written statements and throughout their defence have relied to some extent on this certificate : they have relied upon it as prima facie evidence that all was right. But you have to consider the case of the balance sheet being false and fraudulent. In that case it is a necessary inference from Mr. Mower and Mr. Clifford's reliance upon the auditor's certificate that the fraud or dishonesty, if any were confined to the manager and the auditor whose signatures were on the balance sheet when it was laid before them or in other words that the directors were taken in by Mr. Strachan and Mr. Allen who prepared a false balance sheet for them to sign ; that is putting the matter quite baldly but I think it is a legitmate inference from this line of defence. But such an inference, I submit to you, would manifestly be absurd, for it was not Mr. Allen and Mr. Strachan so much as Messrs. Mower and Clifford who were concerned to prevent the bank from collapsing, and we may reject as wholly improbable any supicion that Mr. Allen and Mr. Strachan would concoct a false balance sheet and keep the directors in the dark about it. The law on the subject of company audits is contained in S. 74, Companies Act, (read it). Then there are the provisions in the Articles of Association of the Bank which are binding on all concerned (Ex. 2). The articles are 110, 113, 114 and 115 (articles read), I also will read for your guidance a passage from a recognized authority on Company Law which describes the duties of auditors, that is Lindley on Companies, p. 617:

"The first duty of auditors is to ascertain what duties are imposed upon them by the Companies' Regulations, and by the acts by which it is governed and to conduct the audit accordingly. Speaking generally, it is their duty to examine the company's books and accounts and to report whether the balance sheet exhibits a correct view of the companys' financial position at the time of the audit; and in doing this they ought not to confine themselves to verifying the arithmetical accuracy of the figures in the balance sheet. It is however no part of their duty to consider whether the business is prudently or imprudently conducted; nor is it their duty to take stock. If special knowledge is required to value the stock or for any other purpose connected with the audit, they are entitled to act on an expert's opinion. If the company's officers have, or may reasonably be supposed to have, such special knowledge, the auditors may trust to them if they have no reason to suspect their honesty. If as is usually the case, it is their duty to report to the shareholders, they will not discharge their duty by reporting to the directors. Moreover except perhaps under very exceptional circumstances, their report ought to contain the information to which the shareholders are entitled; if it merely gives the shareholders the means of information, it will not be suffcient. Auditors are bound to exercise a reasonable amount of care and skill in the discharge of their duties. The amount of care and skill which is reasonable depends on the circumstances of each case; if there is nothing to excite their suspicion, less care will be reason-

able than if their suspicions were or ought to have been aroused.

"Auditors who honestly discharge their duties with the requisite amount of care and skill incur no liability even though they have committed errors of judgment and the balance sheet and accounts are in fact false and misleading. If they do not do so, they will be jointly and severally liable to make good any loss caused thereby, e. g., if dividends are improperly declared and paid on false or misleading accounts certified by them as correct, they will be jointly and severally liable to make good all moneys so misapplied with interest."

You see that an auditor has to ascertain the true financial position of the bank at the time of the audit and to report to the shareholders. He is not there for the directors or manager to lean upon. His main function is to protect the interests of the shareholders: that is what an auditor is for. I said before that S 74, Companies Act, about balance sheet and auditors occurs in a part of the Act which is headed "Protection of members." What the auditor has to see is that the directors and officials are publishing true statements of the bank's affairs, not merely arithmetically correct lists of balances copied from the ledgers of the bank. For example, the auditor should see that the sums shown as good assets in the balance sheet bear some close relation to the actual present market value of those assets, and that debts which are doubtful or bad are duly reserved against. In the case of unsecured debts of course the Auditor has to rely principally upon the Manager and Directors as to the solvency of those to whom they have given credit. In this case Mr. Allen was justified in accepting the Manager's statement about Attia. He apparently had some doubts as to whether the Manager's opinion was correct.

There is little doubt, I think, that Mr. Allen did not feel quite comfortable about the Bank's debts. Before the audit actually began, we find Mr. Strachan writing to the Aung Ban Company and the Refinery Company Liquidators and telling them that the Auditor was threatening to take their debts as unsecured. Letters of lien were obtained from some of the big debtors and Mr. Allen was satisfied. Through an oversight, it appears that no such letter of lien was procured in the case of the Aung Ban Company's debt, but Mr. Allen apparently did not know of this omission. But he was still not altogether satisfied with the debts that were shown as unsecured. His letter of 1st August which has been referred to more than once is most important. To my mind at least, it shows that he passed the balance sheet in spite of serious misgiving about the debts. He points out the weakness of the security for a considerable number of the loans and comments unfavourably on the kind of security and the absence of market quotations, then follows the advice "we strongly advise that the interest on most of the unsecured loans be credited to an interest suspense account or not at all," and he points out that after deducting the amount of the secret reserve from Rupees 9,36,000, unsecured loans, the balance is in excess of the reserve fund of 5 lakhs. What could that mean but that the Auditor had misgivings about this sum of Rs. 6,36,000 odd. If there was no doubt about this large sum, then why should he recommend interest on it to go to interest suspense if credited at all. Mr. Meugens says, that presupposes that they were doubtful debts. If Mr. Allen thought these debts to be good debts, I do not think he would have any reason to make such a recommendation to the Directors.

It is for you to decide whether Mr. Allen should have contented himself with writing to the Directors. It seems to me that he should not. Looking to his position as a short of "watchdog" for the shareholders, I think he ought to have reported to the shareholders the doubts he had about the securities and the advice he was giving to the Directors about the crediting of unpaid interest on the unsecured loans, especially as the balance sheet which he was certifying to be correct treated the unpaid interest on these loans as part of the good aasets of the Bank. I think the omission in the Auditor's certificate of all reference to this matter was hardly justifiable especially when Mr. Allen thought the situation was so serious as to warrant him in recommending that no dividend should be paid for the half-year. Then, again, as regards the Moola Oil and the Burma Petroleum shares I think the Auditor

relied too much on the Director, Mr. Clifford's assurance as to the value of these undertakings.

In ordinary circumstances Mr. Allen would be entitled to take what a Director might tell him on such a point and to act upon it, but in this instance he should have been mindful of the fact that Mr. Clifford was not only a Director of the Bank but was also a Director of the Bank's principal debtor, Mower & Co., and that Mower & Co. had deposited shares of these very companies in the Bank as security for sum seven lakhs of rupees. Mr. Allen has told us that he still considers that this balance sheet honestly and correctly sets forth the position of the Bank at the time. I think you have some reason to doubt whether he can really hold that opinion. It is true that Mr. Allen had very little to gain personally by keeping the Bank open, but if he had stated the true position of affairs and a run on the Bank followed the Bank might have to disclose and the Auditor would lose in his fees as Auditor of the Bank and of Mower & Co. and any of the Mower Companies that might be involved in the crash. It is hard to believe that the loss of these fees would be a sufficient motive for passing a balance, which he knew or had reason to believe to be a false balance sheet. We are however not concerned with his motive. We have to look only at what he actually did. My own opinion is that Mr. Allen's action with regard to the audit and the balance sheet showed a degree of complaisance towards the Directors and Manager which renders it necessary to discount his evidence considerably. But it is entirely for you, gentlemen, to put your own construction upon Mr. Allen's actions and to form your own opinion as to the value of his evidence.

11*th April* 1913. Gentlemen, when the Court adjourned yesterday I had been dealing with the question whether it would be reasonable to give any weight to the suggestion that if the balance sheet is false, the Directors, Mr. Mower and Mr. Clifford, could have no responsibility for it because they were entitled to rely on the certificate of the Auditor and on the Manager's signature. I told you that, in my opinion, it is highly improbable in this case that the Manager with the connivance of the Auditor would concoct a false balance sheet and keep the Directors in the dark about it.

It is necessary now to say a few words about another line of defence, which relates to Mr. Okeden's connexion with the Bank. It has been suggested that though Mr. Okeden did not actually sign the balance sheet, he was here throughout the greater part of the interval between signing of the balance sheet and the closing of the Bank, and he must therefore have known the actual state of affairs just as well as the other Directors. Here it is argued he is a man of undoubted integrity who with a full knowledge of the facts saw nothing legally or morally wrong in keeping the Bank open till 13th November. In such circumstances how can you say that the other Directors or the Manager acted dishonestly in doing precisely the same thing? There is a fallacy in this argument and that fallacy lies in the assumption that Mr. Okeden had a knowledge of the state of affairs equal to that of the other Directors—the present accused. It is quite clear I think that he had not. He had no concern in the various Mower Companies and he knew little or nothing about their affairs. He has appeared before you as a witness and has said among other things that he considered, he duly exercised the control which according to the Articles of Association are vested in the Directors. It seems to me that Mr. Okeden's control was of a very flimsy description and that he was practically and ornamental figure on Board and nothing more. He did not even know that Mower & Co. banked with the Bank of Burma. He attended the meetings of the Directors and read any notes which the Manager might think fit to circulate for the information of the Directors. But I think, it is evident that he exercised no effective control and had only the sketchiest knowledge of what was going on. His evidence shows that he never thought it necessary to look into things for himself but relied implicitly upon what was told him by his co-directors, and by the Manager. Even matters of the first class importance, such as Andesashia's complaint to the Bank in March 1910, and the Auditor's letter of 1st August 1911, did not put Mr. Okeden on inquiry for himself and did not ruffle his confidence

in the other Directors and Manager. Though Mr. Okeden may have been a negligent Director, I think it is certain that he was not a dishonest one and that this must be so, is indeed admitted by the defence. If the balance sheet was really false, he, at any rate appears to have known nothing about it. His case is distinguished from that of the three accused, who all approved and signed the balance sheet and whose state of knowledge as to the contents of the balance sheet we must now consider.

Accused's knowledge of Bank's Real State.

It would have been very convenient if I could have put to you first, the question whether the balance sheet is in fact false or not : that is the foundation of the whole case. It would be convenient to get your decision on that question before dealing with the further question, how far each of the accused is shown to have had guilty knowledge, for if you are satisfied that the balance sheet was not false, or rather if you are not satisfied that it was false, there is an end of the matter. But I cannot put the case to you piecemeal : it must all go together. You will understand therefore that the remarks that I have to make as to the degree of knowledge of each of the accused are for your consideration only if you do find the balance sheet to be in fact false and not otherwise. You have to consider the case of each one of the accused separately, for it does not, by any means, follow if one is found to be guilty, that the others must necessarily be guilty. It may well happen in a Bank prosecution like this where the Manager and certain Directors are prosecuted jointly, that only the Manager or, it may be, one of the Directors, is found to have acted with the guilty knowledge and intention requisite for a conviction. It is easy to imagine such a case. Therefore in the present trial, it is for you to decide not only whether the balance sheet was false but whether as regards each of these persons he knew it to be false when he signed it. If you find, as a matter of fact, that one or more of them signed without knowing or having good reason to believe that it was false, then as regards that accused or those accused, you should certainly bring in a verdict of not guilty. I must repeat that it is not enough for a conviction of this offence to prove that an accused was very careless or very negligent, that he relied too much on the assurances of others as to the correctness of what he was signing. The law requires much more than carelessness or negligence. It requires positive dishonesty and there is a very wide gulf between the two. Without actual knowledge that the balance sheet was false, there would be no dishonest intention, and dishonest intention as I have already pointed out to you, is an essential element, indeed it is the main element, in the offence charged against these accused. You have therefore to decide as to the knowledge of each of the accused at the time of the signing of the balance sheet on 1st August. And for your guidance in considering this question, I will read to you the words of the Judge in summing up the City of Glasgow Bank case, a case which resembles this one in many respects. In that case as in this, there was a balance sheet which the prosecution alleged to be false and the jury had to decide not only as to the falseness of the balance sheet but also as to the guilty knowledge of the accused Directors individually.

The Judge says : "As to the knowledge of the Directors that these balance sheets were fabricated. Now, what the prosecutor has undertaken to prove, and says that he has proved, is not that these Directors were bound to know the falsity of the statements in the balance sheets—not that they lay under obligations to know it, not that they had the means of knowledge—but, that, in point of fact, they did know it, and that is what you must find before you can convict the prisoners of any part of the offences attributed to them. You must be able to affirm in point of fact, not that they had a duty and neglected it, not that they had the means of information within their power and failed to use them, but that, as a matter of fact, when that balance sheet was issued, they knew that the statements contained in it were false. I say that, because there has been some phraseology used in the course of this trial that would seem to indicate that a constructive knowledge was all that was required for such a case. Constructive knowledge might be quite sufficient if we were dealing here simply with an action for civil debt or civil reparation ; for what a man is bound to know he shall

be held to have known. But that has no place at all when a man is charged with crime. His crime is his guilty knowledge, and nothing else. He is charged with personal dishonesty, and you must be able to affirm that on the evidence before you you can convict him. But while I say that, gentlemen, I by no means, mean to say that the knowledge which you must find must necessarily be deduced from direct evidence of it. You are not entitled to assume it; but you are entitled to infer that fact, as you are entitled to infer any other fact, from facts and circumstances which show and carry to your mind the conviction that the man when he circulated, or when he made that balance sheet, knew that it was false. You must be quite satisfied however before you can draw that conclusion, not merely that it is probable, or likely, or possible that he knew, but that he did, in point of fact, know the falsehood of which he is accused."

I will take first the case of the two Directors, Mr. Clifford and Mr. Mower, and as regards these two accused, it is necessary to deal with an aspect of the case which distinguishes it from other Bank trials. I refer to the interdependence of the Bank of Burma on the one hand and what are referred to as the Mower Companies on the other. This is a fact which leaps to the eye and which I consider highly relevant to the charge. It is undisputed that these two accused, who were the original Directors of the Bank and continued to be Directors till the Bank closed in November 1911 were also Directors of Mower & Co., the principal debtors of the Bank, and had either through Mower & Co., or as individuals, a very large and in many cases a controlling interest either as Managing Agents or Directors or principal shareholders, in most of the other large companies which were financed by the Bank. To make this quite clear, it is sufficient for you to refer to Mr. Clifford's note, Ex. 26 (a). It is attached to the Manager, Mr. Strachan's note of 30th October: Exh. 26. It has been read to you more than once and I do not think I need read it to you again. It shows the close connexion between Mower & Co., and most of the other companies. A statement, Ex. 89 (b), has been prepared to show the extent with which the funds of the Bank were used for the purpose of financing the Mower group of companies. There is another statement, Ex. 89 (a). Ex. 89 (a) is a revised edition of another Ex. 89, put in evidence in the Magistrate's Court for the same purpose. It has been pointed out that there are great differences between the two Exhibits. Mr Holdsworth explained that the omissions in the second statement were in favour of the accused, but it is a pity that more pains were not taken to compile the information correctly in the first instance. I prefer to draw no inference from Ex. 89 (a). As regards Ex. 89 (b), however. the figures in that statement have not been challenged and I think you may take the information given in that statement into consideration. As I have said, Mower & Co., themselves were the greatest debtors of the Bank. For information as to the other companies mentioned in Ex. 89 (b) you can look at the balance sheets and the list of shares in Exs. 45 (a) to 58 (c) and Ex. 60 (f). You will notice among other things that two-thirds of the Burma Investments shares were held by S. A. Mower and that the Burma Investments Company had more than one-half of the Rangoon Oil shares afterwards converted into British Burma Petroleum shares, so that S. A. Mower had a controlling interest in the Rangoon Oil Company. Attia whose accounts are shown in Ex. 89 (b), was originally a partner in Mower & Co. but retired in 1907.

Mr. Cotterell was a partner in Mower Cotterell & Co. which afterwards became Mower, Limited. He was also a partner of Marshall Cotterell & Co. in which Messrs. Mower and Clifford and the firm of Mower & Co. held more than half the shares. At the bottom of Ex. 89 (b) you will see a summary of the figures. According to this summary, the total amount of loans and overdrafts due to the Bank on 30th June 1911. was 122 3/4 lakhs in round figures, and out of this total, the Mower Companies with Attia and Cotterell, were responsible for over 105 lakhs. Out of Rs. 9,21,000 odd shown as bills receivable in the balance sheet, the Mower Companies together with Attia and Cotterell were interested as drawers or drawees or both in all but a small fraction. These figures have been worked out by Mr. Holdsworth and their accuracy has not been questioned. It is impossible, in my opinion, to shut our eyes to these facts

or to overlook the important bearing they have on the case. They lead to the conclusion that the Bank of Burma, founded by Messrs. Mower and Clifford, existed primarily for the purpose of obtaining funds with which to carry on the operations of the Mower Companies. I am not saying that the Directors were contravening the law in getting funds for their various companies in this way. So far as I can see there was nothing illegal in it. The prescribed form of balance sheet has a heading on the assets side. "Sums due by a Director or other officer of the Bank." But this refers to sums due by them in their personal individual capacity. It does not refer to sums due by companies in which they are interested, however intimate or preponderant their interest in such companies may be. This is a matter to which the legislature have turned their attention in framing the new Companies Act, but under the present law (Companies Act, 1882), the law which applies to this case it appears that the Directors of a Bank could also be Directors and Managing Agents and part-owners of any number of companies indebted to the Bank, and there would be no legal obligation on them to disclose such facts to the public. You must, therefore, dismiss from your minds any shadow of bias against the accused on this score. You may think it a vicious system, which allows the funds of the Bank to be used mainly for the purposes of oil-winning and other industrial concerns in which the Directors themselves are among the persons chiefly interested, but it would be entirely wrong to let any such views influence your decision as to the guilt or innocence of the Directors in this case. They did nothing more than what the law permitted in this matter. I have introduced these remarks for a different purpose altogether, that is, to assist you in deciding the question of the two Director's actual knowledge of the affairs of the Bank on the date that they signed the balance sheet.

It seems to me that the close connexion of Messrs. Mower and Clifford with these companies and with Attia and Cotterell gave them special, not to say unique, opportunities for knowledge of the state of the principal debts. It must be said that they had better opportunity than Bank Directors ordinarily might be expected to have. I find it difficult to believe that they kept their knowledge of the affairs of these various companies in a brain compartment entirely shut off from the brain compartment which was brought into use in perusing and approving the balance sheet, the profit and loss statement and the Director's report of the Bank. This however is a matter entirely for you as businessmen to settle for yourselves. Opportunity and knowledge are not the same thing. You are entitled to any reasonable inferences but they must be reasonable, The law about inferences of this kind is that you may presume the existence of any fact which you think might have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case before you, and bearing that in mind, you will have to decide what inferences you can legitimately draw from the opportunities of knowledge which the accused Directors had. Your common sense and business experience will enable you to decide how far actual knowledge of the state of the debts and securities can reasonably be inferred from the opportunities which these two Directers had by reason of their connexion with the affairs of the debtor companies and their connexion with Attia and Cotterell.

Taking first the case of Mr. Clifford, you will see he was the sole Director present in Rangoon for some months before the balance sheet was issued. He denies that he took any part in the preparation of it: this is in contradiction of what he is reported to have said at the meeting of shareholders after the Bank closed. He said: "In June of this year when the half-yearly balance sheet was issued, the securities held by the Bank were subjected to close scrutiny by the Auditors and Directors, and valuations assessed at a minimum market price." He says, the report of that meeting is inaccurate, and it is clear that it is inaccurate at any rate in one respect, because it mentions Directors in the plural and I understand that there was only one Director in Rangoon at the time of the audit. I think Mr. Clifford's explanation may be accepted at any rate to the extent that he did not take any part in preparing the details of the balance sheet. But you will have to con-

sider the likelihood of the Bank of the Manager deciding for himself without reference to the sole Director in Rangoon such radical questions as the total amount of debt to be credited as good, the amount to be classed as doubtful or bad and against which provisions should be made by way of reserve in a contingency fund. As to that, of course, you must also remember the evidence given by Mr. Kesteven. He said: "I am a Director of a few companies. So far as my knowledge goes the Directors usually rely on the auditors as to the accuracy of the accounts and do not go into the figures themselves." I see he also says, however in cross-examination "that the Directors are supposed to be generally cognisant of the affairs with which the balance sheet deals but not with all the details of the affairs." This gentleman Mr. Kesteven, was apparently never a Director of a Bank though he was a Director of other companies.

It is true that wide powers were conferred on the manager by the power-of-attorney (you see the power-of attorney among the exhibits), but these powers were not conferred to the exclusion of the Directors' powers. It would be absurd to hold the Director responsible for any mere details of Bank management but in large matters such as I referred to just now, it is not unreasonable to presume that the manager acted in consultation with the Directors. At least so it seems to me, but this is a matter which you have to decide for yourselves. You will remember that para. 86 of the Articles of Association laid down that the management and control of the Bank shall be vested in the Directors, that is to say, they are left no option but have the duty of managing the affairs of the Bank expressly laid upon them. Whatever powers they confer on tho General Manager, the Directors cannot divest themselves of the general duty of management and control, or perhaps I should say, the general supervision and control, so long as they continue to be Directors. I think therefore you must presume that Mr. Clifford as the sole of Managing Director in Rangoon at this time, did exercise the supervision and control that were vested in the Board of Directors and that in exercising these functions he would naturally become conversant with all really important matters concerning the Bank. Mr. De Glanville drew attention to an English case in which it was laid down that a Director is entitled to trust the officers and servants of a Bank to do their duty honestly and that, of course, is perfectly true as a general proposition: but that English case was a civil case in which somebody tried to make the Director responsible for the misdeeds of a dishonest manager. The balance sheet which was laid before that Director, the defendant, falsely represented the Bank to be flourishing and the Directors' report falsely stated that proper provision had been made for bad debts. It was very like the case alleged by the prosecution here in those respects.

But in that case though the balance sheet was really false, the Director, who was the defendant, believed the balance sheet and report to be perfectly true and he had no reason to suspect the honesty or competence of the manager. He was himself deceived by the manager. He was deceived by the false balance sheet and report and it was held that he was not civilly liable to make good the money which had been improperly paid away as dividends on the basis of this balance sheet and report – that was the case --much less would he be liable criminally. It appears in that case that not only the manager but another Director who was a Managing Director had for years before, fraudulently concealed the true facts of the value of the outstanding debts and other matters, which it was their duty to bring to the notice of the Board, and which might have been discovered by the defendant Director if he had made a careful examination and comparison of the accounts of the Bank. You will see, gentlemen, that in this English case the circumstances were very different from those alleged in the present case. It is not pretended by any one that Mr. Strachan deceived or had any motive for deceiving Mr. Clifford and Mr. Mower in any way. The suggestion of the prosecution on the contrary is that they all acted in concert.

Well, gentlemen, whatever you think about the minor debts of the Bank, it seems to me that you might reasonably infer that Mr. Clifford knew most of what was essential to know of the large debts—those of Mower and Co., the Re-

finery, Aung Ban, Mount Pima, Cotterell Moberley and Stephen. This is an important question of fact which you will have to decide. You must give all due weight to the circumstance that has appeared in evidence that Mr. Clifford at the time of the audit was suffering from sprue. A man who was in bad health, might not take such a close interest in his business affair as he would if he were in good health. There is some conflicting evidence about this because one witness, Compton, said that at this time Mr. Clifford was attending office and kept very late hours. He says:—"I came out to Rangoon at the end of May 1911, in the service of the British Burma Petroleum Company. At that time I worked in the office of Mower & Co. The work in that office was very heavy from that time until November 1911. Mr. Clifford had very frequently to remain in office until late at night. I had also to do the same, six months on end, three or four nights a week. We worked until midnight sometimes." It is not clear, whether Clifford was ill in June and July but it appears it was about this time, at any rate, that he was suffering from sprue, and you have to give due weight to the fact.

It is clear however that Mr. Clifford knew the Auditor's opinion that in the circumstances no dividend should be declared. He was advised of that fact in the course of the audit and he was in a position to understant fully why the Auditor gave that advice.

It is impossible to disassociate that advice given by Mr. Allen from the letter which Mr. Allen wrote on 1st August, Ex. 30, which shows that the Auditor was uneasy about the securities and thought the unsecured loans for Rs. 6,30,000 were somewhat shaky at any rate. Mr. Clifford was aware, of course, of the nature of the securities for the Refinery debt and extent to which the liquidators' claim was disputed in July 1911. As Managing Director of Mower & Co., he knew all about that matter. I discussed the Refinery debt yesterday and the security for it. I left it to you to exercise your own judgment as to whether the lien on the liquidators' claim against the British Burma Petroleum Co., could be regarded as a good security or whether it would only be regarded as a sort of makeshift to tide over the audit. If you take that view of the security for the Refinery debt, you must also consider whether Mr. Clifford realized when he signed the balance sheet that this lien on the liquidators' claim should be so regarded, that is, as a makeshift to tide over the audit. Did he realize or did he not, you should ask yourselves, that the British Burma Petroleum Co., must needs take action to have this lien surrendered by the Bank and that the Bank would inevitably have to give way for fear of ruining the British Burma Petroleum Co. of which they held such an enormcus number of shares. Then you will also remember that Mr. Clifford was actively directing the affairs of Mower & Co. for some months before the balance sheet was issued and he was also the active controller of the large interests of Mower & Co. and of Mr. Mower in all the various other Mower Companies.

It seems that he had full opportunities of knowing the extent of all the large debts of the Bank and in a general way at any rate, of the security which the Bank held for these debts. You must look to the nature of the security, which consisted chiefly of British Burma Petroleum shares, Burma Investment shares and shares in companies which were controlled and financed by Mower & Co. Looking to that circumstance it appears that Mr. Clifford must have known as well as any one the realizable value of those securities at the time the balance sheet was issued. If the balance sheet did take credit as good assets, for a large amount of debts which are really doubtful or bad, if you come to the conclusion that the resulting profit shown on the half year's working was for that reason fictitious, I think there are substantial grounds for believing that Mr. Clifford was at any rate cognizant of this state of affairs. I am entitled to give my opinion on this point and on other points of fact, but it is an opinion which does not bind you as I said before, and you can reject or follow it as you think fit. You will, of course, give weight to the fact that Mr. Clifford did not sell out his shares in the Bank and as regards his account in the Bank, which as we know was pledged as security for Mower & Co.'s debt, there appears to be no real ground

for urging that he tried to take money out of the Bank for his own purposes, when the collapse of the Bank appeared to be imminent.

Next as to the General Manager, Mr. Strachan. He accepts full responsibility for the figures in the balance sheet which were all prepared by him with the exception of the two inner columns, dividing the good debts into debts for which security was held and debts for which no security was held. That sub-classification of the good debts was effected by the Auditor in consultation with Mr. Strachan. We have the Auditor's evidence about that, and it agrees with what Mr. Strachan says. It was Mr. Strachan's duty as General Manager to be conversant with the financial position of persons and companies to whom money had been lent by the Bank, and it may fairly be presumed that he was posted at any rate in a general way in reference to all or most of the debtors. As to A. Stephen's debt, he had some special means of knowledge because he had been the Liquidator of Stephen & Sons' estate up to December 1910, and he was in a position to know how far A. Stephen's balance could be considered a good recoverable balance. Major Meagher's account has specially occupied his attention: he wrote that letter, Ex. 96, to the Manager in Madras, specially about this debt. In connexion with Major Meagher, I should like to correct what appears to be a mistake in what I said yesterday. I said that Major Meagher's stock was sold for Rs. 8,000. But I find that, as a matter of fact, this figure was merely suggested to him in cross-examination and he said he did not know what the stock had been sold for. So you have to dismiss from your minds that remark I made to you as to Major Meagher's stock having been sold for Rs. 8,000. You have no evidence as to the price realized. He did say however that his debt to the Bank became a bad debt because the Bank closed and because the Liquidator had sold off his stock.

Mr. Strachan had been specially interesting himself about Major Meagher's account just before the balance sheet was issued, and he therefore had means of knowing or knew as well as any one in the Bank could know, what prospect there was of recovering that debt. He knew the state of the accounts of all the minor debtors and with reference to the large debts, Mower & Co., Mount Pima and so on, you will see from his written statement that he was conversant with the state of affairs regarding each of these debts. As regards the Refinery debt in particular he denies that he knew that the whole of that debt was being disputed by the Liquidators, but in his examination by the Liquidator, Mr. Holdsworth, Ex. 21 (o), he admitted that he must have discussed this matter with the Director, Mr. Clifford. It is not suggested that Mr. Clifford concealed anything from him in the course of that discussion, but on the other hand, there is no evidence that Mr. Strachan saw or was told the contents of the cable of 6th July from John Taylor & Sons, Ex. 72 (g). As regards the Aung Ban debt, Mr. Strachan admits that the promissory notes of the Liquidators were the security, apparently the only security held by the Bank. It appears that Mr. Strachan did not get a letter of lien on the Aung Ban Liquidators' claim such as he did get in the case of the Refinary Company. We have no evidence as to why he did not get it; it may have been by inadvertence. At any rate there was no security for the Aung Ban debt except the pro-notes of the Liquidators. Then he received the Auditor's letter of 1st August—he received that letter on the day on which it was written and he saw in it the Auditor's recommendation as to the crediting the interest on the unsecured loans to an interest suspense account.

As in the case of Mr. Clifford I think, you will have no difficulty in deciding that Mr. Strachan knew the true state of affairs as regards most of the debts of the Bank and the securities held for them, and if the balance sheet of 30th June 1911 was really false and fraudulent, he at least must have been aware of it. But as I said, with regard to Mr. Clifford's knowledge I say also with regard to Mr. Strachan's knowledge that this is a pure question of fact for you to decide on the materials before you and you can discard my opinion altogether if you disagree with it. If the balance sheet was false there was a strong probablity that the Manager who drafted it and worked out the figure of profit

Rs. 1,62,000, was cognizant of its falsity. At the same time you must remember that if the Bank had collapsed in August 1911, it could not have been as vital a matter for Mr. Strachan as it was for Mr. Clifford and Mr. Mower. He was not interested as they were in the Mower Companies though he certainly knew how closely the fortunes of the bank were bound up with the Mower Companies. If it was necessary for the safeguarding of the Mower Companies to keep the Bank open and to shove it up with false balance sheets : that motive would not operate so strongly with Mr. Strachan as with the others. But it is, of course possible that he might be a party to this design out of a mistaken sense of loyalty to Messrs. Mower and Clifford. However his motive is not what we are concerned with, but what he actually did and if, as a matter of fact you do find the balance sheet to be false and deceitful, you must decide whether Mr. Strachan with the means of knowledge which were at his disposal as General Manager of the Bank could honestly believe that all the debts with the exception of those provided for.in the contingency fund, were good assets of the Bank and that the profit he showed in the balance sheet was a real and not a fictitious profit.

I now turn to the case of accused 3, S. A. Mower. He was the Senior Director of the Bank from the beginning and was the leading figure in the Mower Companies, and also the leading figure in the Bank. Though he presided at the meetings of Directors when he was in Rangoon it does not appear that he took any active part or any great part in the management. He was absent in Europe a good deal and in fact he was absent for several months before the balance sheet was signed on 1st August. He arrived from England on that day.

It is clear therefore that he could have had no hand in the preparation of the balance sheet and that he had a very short time at most a few hours to look into the balance sheet before the Directors' meeting which was held on the day of his arrival. The minutes of the Directors' meeting is at page 33 of the Minute Book. It is possible, of course, that Mr. Mower did not look into the balance sheet but signed it off-hand. The Minutes of meeting are as follows:

"Minutes of the 36th meeting of Directors held at the Registered Office of the Bank on Tuesday, 1st August 1911.

PRESENT. G. S. CLIFFORD,
CHAIRMAN, AND
S. A. MOWER

The Minutes of the 36th Meeting of Directors was read, confirmed and signed. The audited accounts and balance sheet and profit and loss accounts were placed on the table and signed. The Directors decided to confirm the allocation of the available profits amounting to Rs. 1 62,277-12-5 as follows:

	Rs.	a.	p.
To declare an ad interim dividend at the rate of 7 per cent. per annum, free of Income tax absorbing ...	61,687	8	0
To place to reserve fund making that fund Rs. 5,75,000	75,000	0	0
To carry forward	25,590	4	5
Total ..	1,62,277	12	5

The Directors were glad to see that the working Capital of the Bank had increased during the half year from Rs. 1,53,13,703 to Rs. 1,69,31,785 and that the Bank's investments in 3 1/2 per cent. Government paper had been increased by Rs. 50,000 to Rs. 15,68,800.

(Sd.) S. A. MOWER,
"Chairman,"

The only Directors present were Mr. Clifford and Mr. Mower. We are told that the Manager was also present at these meetings.

These minutes show that Mr. Mower knew at any rate that a sum of Rupees 1,62,000 odd net profit, was represented as having been earned in the half year including the amount carried forward from the previous half year and the question arises whether it is likely that he signed it without any inquiry from his co-Director, Mr. Clifford, or from the Manager as to the method by which this large figure of profit was worked out. I suggest to you that he must have known that Mower & Co., and the Mower Companies were the Bank's principal debtors. Would he not also have known or have a general knowledge of the nature and extent of the security held by the Bank for the debts of these Companies? The fall in the value of shares in Rangoon had been

going on since the beginning of the year. There is a document which mentions that fact (Ex. 23), Mr. Strachan's note circulated to the Directors .during the week ending 2nd September 1911. "During the past eight months (from January 1911) the share market in Rangoon has gone through a very critical period and prices of shares are now the lowest that have been known. This has resulted in the secured position of the Bank being considerably jeopardised". Well, it is not reasonable to suppose that Mr. Mower was ignorant of the trend of affairs in Rangoon as regards the share market.

It may be that he had no precise knowledge about the various liens obtained from the debtor companies by the Bank while he was absent in England. But you must consider whether Mr. Clifford and Mr. Strachan kept these important matters to themselves or whether they were communicated to Mr. Mower on 1st August. The time was short for such communication, at most a few hours, but there was time. Mr. Clifford's memorandum at the foot of Ex. 30 (the Auditor's letter of 1st August) suggests that it was his practice to talk over important matters with Mr. Mower when Mr. Mower happened to be in Rangoon and as regards that letter, you have to decide for yourselves whether it had been seen by Mr. Mower before he signed the balance sheet. If he saw that letter before signing the balance sheet, he would know at any rate that the Auditor was uneasy about the securities and that the Auditor had an uncomfortable feeling also about the unsecured loans. Whether it was seen before the balance sheet was signed, depends a good deal upon the date when Mr. Clifford's memorandum was written. It appears to me to have been written on 1st August but you will have to form your own opinion from an inspection of the document. It may be however that the discussion referred to therein occurred on 1st August but after the balance sheet was signed. It was signed then but it was not actually issued until 4th August. As regards the Auditor's advice not to pay a dividend, it is possible that Mr. Clifford did not inform Mr. Mower about this but it seems to me that this was a matter which Mr. Clifford was very likely to communicate to Mr. Mower. Mr. Clifford's interests and Mr. Mower's interests were almost, if not entirely, identical and it is difficult to think that it would not have occurred to Mr. Clifford to inform Mr. Mower of this important matter as bearing on the balance sheet which was being signed and issued. You will have to consider, gentlemen, whether Mr. Mower must not be held to have known the position and prospects of the Moola Oil Company and Irrawaddy Petroleum Company in which his firm had such very large holdings and the shares of which had been deposited by his firm as security with the Bank to such a large extent. You must also take into account in deciding as to Mr. Mower's degree of knowledge, the fact that though he was the Senior Director of the Bank and of Mower & Co , he did not take the most active part in the affairs of the Bank or of Mower & Co. It was apparently Mr. Clifford who was the active controller. But though Mr. Mower is shown by the evidence to have come to office only for one or two hours a day and then to have done no office work, I think there are no grounds for holding that he was a mere sleeping partner in these firms. As might be expected from his age and seniority, he left most of the work and most of the details of management to Mr. Clifford, but one may presume that Mr. Mower was no mere dummy and that he took a prominent part in directing the affairs of Mower & Co. and of the Bank. It appears to me that this is not a case of mere constructive knowledge. It is a case in which you will have to ask yourselves whether Mr. Mower must have really possessed the requisite knowledge about the falseness of the balance sheet, having regard to all the circumstances, that is to say, having regard to his position and opportunities and the probabilities that he really used those opportunities as a reasonable man would, and having regard to his relationship with Mr. Clifford. Looking to these matters, you will decide whether Mr. Mower really had this knowledge or not when he signed this balance sheet.

If you think there is a reasonable doubt —if you lean to the view that he signed the balance sheet, blindly relying on the Manager's and Auditor's signatures, without troubling to ask for any information about the large profit shown

in the balance sheet and honestly believing that the profit had been really earned, then, however careless and negligent he may have been, you should acquit him, even though you think the balance sheet to be false and fraudulent. Some stress was laid by the prosecution on the fact that Mr. Mower drew out all the money he had in the Bank. I admitted the evidence also that Mrs. Mower was allowed to withdraw her fixed deposits without penalty, for it seems to me that she may reasonably be presumed to have acted in this matter under her husband's advice. It seems very doubtful from the evidence we have whether any favour was shown to her in the matter of interest and the evidence on that point is unsatisfactory. I do not think you will be justified in presuming that any favour was shown to her with regard to interest. But she took out all her money in August, and put it in Government paper. Mower's account went on till November; but he cleared out before the Bank closed.

These matters are of importance only if you come to the conclusion, that the balance sheet was actually false and that Mr. Mower knew it to be so when he signed it. In that case they furnish corroborative evidence on the question of carrying on the Bank, for these facts tend to show that he was aware of the impending collapse of the Bank at an early period and that he took steps to save his relatives from being involved in the disaster. You must also remember that though Mr. Mower and Mrs. Mower withdrew their money, Mr. Mower did not part with his shares in the Bank. Both Mr. Mower and Mr. Clifford might have paid up the amount due on their shares and then have sold them at a considerable profit when they were 125 or 130. This is a fact which weakens any presumption arising from the withdrawal of cash from the Bank by Mr. and Mrs. Mower. But again it may be remarked that if either of these two Directors were to sell a number of their Bank shares, it might have roused suspicion and in that way hastened the fall of the Bank which they were anxious to avert as long as possible.

As I have already laid down, you are not justified in finding any of the accused guilty, unless the balance sheet is proved to your satisfaction to be false. If the balance sheet was not false, it follows that the Bank was in a sound and even flourising state on 30th Juue 1911 and if the difficulties which led to its ultimate failure began later than the date on which the balance sheet was issued, then the carrying on for a month or two longer while the Directors were endeavouring to avert the catastrophe, might or might not be justifiable, but it could not, in my opinion, be regarded as positively dishonsst, and, of course, without clear proof of positive dishonesty, there can be no conviction in this case.

According to the defence, the Bank was in a sound financial state on 30th June and its collapse in November was due to the rapid depreciation of security in the meantime and to the action of the British Burma Petroleum Co in any repudiating the Refinery debt. It is certainly the case that the securities of the Bank fell in value to a very great extent after June. But according to the prosecution the Bank was already in a sinking condition in June-July 1911 being weighed down with a load of doubtful and bad debts, and the fall in securities after that date only precipitated the collapse which was in any case bound to come soon. We have Mr. Warren's and Mr. Kestevan's evidence as to the steps taken by the accused, G. S. Clifford, when it was realized that the Bank could not possibly issue a favourable balance sheet for the half-year ending 31st December 1911 unless assistance was given from outside. We have no reason to question the propriety of the steps taken by the Directors at that stage. It would be difficult to say at what date the Bank become insolvent in the sense that all its reserves and capital were gone. It depends upon a great many factors. But you need not concern yourselves with this point at all. Whether the Bank was insolvent or not. the carrying on the business of the Bank on the strength of a false and deceitful balance sheet, would be an aggravation of the dishonesty of the balance sheet. As I have said before, the mere carrying on after the 30th June would not by itself constitute cheating. The carrying on after 30th June must be considered with reference to the balance sheet and the knowledge which can be imputed to the accused as to the

character of the balance sheet. The case hinges entirely on this balance sheet on your decision as to whether it was really false and deceitful. If you find that it was not, the accused should all be found not guilty. If you find that it was, then you will have to decide further with regard to each one of these men ; whether it was false to his knowledge when he signed it and you will give your verdict of guilty or not guilly accordingly, on each of the three charges of cheating.

I want to make a few remarks on general matters which have been referred to by the learned counsel for the defence before closing. First, about Teehan's debt and M. Coltman's remark that the evidence relating to this debt was introduced only for the sake of prejudice. I think the prosecution were fully justified in putting in as exhibits the correspondence regarding Teehan's debt. They were not produced to show that the Bank had made loans imprudently in the past. Mr. Coltman's point is that the Bank having shown the debt as bad at the July audit, it was superfluous to put in the correspondence. But the prosecution were concerned to show that the Bank had no right to show the interest on this debt as earned income. We have now been told that the interest, though taken to profit and loss was afterwards taken out again or " written back" as the technical phrase goes, in the provision of Rs. 71,000 which was added to the contingency fund on 30th June. But there was nothing in the books of the Bank to show this and it was an entirely new procedure for this Bank. The practice up to October 1910 had been to put interest on doubtful or bad debts to what is called a " Deferred Interest Account. " It is Ex. 9. You will see that the deferred interest account was in abeyance from October 1910 up to July 1911. The practice of crediting to deferred interest account was the usual practice of the Bank and this practice was resumed after the issue of this balance sheet during the half-year ending December 1911, It was therefore a reasonable presumption on the part of Mr. Holdsworth that the interest on the doubtful and bad debts in the half-year ending 30th June 1911 was taken as profit, for he had nothing to show what that sum of Rupees 1,000 in the profit and loss of statement was meant to provide for. Even Mr. Allen, the auditor, seems to have been in doubt as to what these figures really included, for in one part of his evidence he said these figures included provision for unpaid interest on unsecured loans which were not bad or doubtful, but he afterwards admitted that this could not be so, because the contingency fund was all but exhausted in making provision for principal and interest of the bad or doubtful debts recognized as such at the audit. There was nothing left over which could be taken as interest on unsecured loans. Well, if the Bank's Auditor was uncertain as to the contents of the contingency fund, it is hardly surprising that it did not occur to Mr. Holdsworth to look for the provision for interest on the bad debts in the contingency fund. The matter has now been explained by the defence and I think the prosecution and you, gentlemen, will accept the explanation that provision for the interest on the bad and doubtful debts which were recognized as such at the audit, was really included in the secret reserve or contingency fund, that is to say, in the sum of Rs 2,94,000 odd. I have only to repeat what I said yesterday that no imputation of dishonesty rests on the accused as regards their treatment of the debts of Teehan, Gorse, Dennis and the other persons whose debts were taken by the Manager and Auditor as bad or doubtful at the audit in July 1911. It is no part of the prosecution case at all that the interest on these debts was wrongly credited to profit and loss.

As to the order passed by Robinson, J., I agree with Mr. Coltman in advising you to pay no attention whatever to the fact that this prosecution was ordered by the civil Court. The order was passed ex parte, that is to say, without hearing the defence and the fact that the Judge thought fit to order a prosecution on Mr. Holdsworth's ex parte affidavit should, of course, not influence you at all. The fact that this order had actually been passed was allowed to be proved merely as introductory matter, explaining how the prosecution was initiated. It would be entirely wrong for you to rely on the order in any way as conclusive of the guilt of the accused or even as furnishing any substantial ground whatever for holding them to be guilty.

Another point is that in Ex. 40 (b), the profit and loss statement of the Bank of Burma, a considerable sum was written off for depreciation of furniture, provision for income-tax and other matters. The total amount, I think, was Rupees 17,000 exclusive of the provision for contingencies and the provision for bad debts. It is urged that if the Bank management were really in difficulties in July 1911, if they did not know where to turn to show a profit, the first thing that would naturally occur to them would be to forgo or rather to postpone the writing off for depreciation and other matters. This is certainly a point in favour of the honesty of the balance sheet. Of course, it would be a stronger point if the amount were greater; as it is, the amount is not really very large.

Another strong point in favour of the accused is the fact that no fraudulent entries or fabrications have been brought to light in the books or correspondence of the Bank. Mr. Holdsworth, I think, said in his affidavit that there were such entries but he was at a loss to substantiate this accusation. Of course, it is possible to regard the rating of the Moola Oil and British Burma Petroleum Oil shares at their full par value as false and fraudulent. That entirely depends upon the value which you are going to attach to these shares. You must remember also that the essence of the charge against the accused is that the Bank management took credit for large sums as good debts which at least were very doubtful: that is the prosecution case, and this is a kind of fraud which can be carried out without making positively fraudulent entries in the books. The fraud, if any, would be in the minds of those who were responsible for the balance sheet and in the guilty knowledge they had that the debts put down as good debts were really not good debts. At the same time you should certainly take into consideration this point in the accused's favour and especially in the Manager's favour, that so far as can be seen, they have handed over all their accounts and correspondence files complete without any attempt to fudge or fabricate the accounts or to burke correspondence which it might have been inconvenient for them to disclose. I would specially refer to Ex. 30 which has been so much commented upon and which I remarked is prima facie at any rate a damaging piece of evidence.

Then as to the amount of ready money at the disposal of the bank when it closed its doors. I do not think this matter affects the question you have to decide. Deposits came flowing in from India to the extent of 40 lakhs in the interval between the issue of the balance sheet and the closing of the bank. This was in the ordinary course and, as a matter of fact, the disbursements of deposits kept pace with the receipts. It has been shown that at the time of closing the bank, there was considerably less money belonging to other people in their hands than they had on 30th June 1911. It is quite clear that the bank closed because the management saw that a run on the bank was imminent, and saw also that they had not the funds to meet the run and had no prospect of getting the funds either by realizing their securities or by borrowing from another bank. I think I have now touched on all points which it was necessary for me to mention and the issues you have to determine should now be clear to you. I have only to say in conclusion that the accused persons are entitled to the benefit of any reasonable doubt in your minds, whether it is a doubt as to the actual falseness of the balance sheet or a doubt as to the knowledge of its falseness by the accused. By a reasonable doubt is meant the sort of doubt which would influence you as conscientious and sensible men in deciding momentous questions in your own lives. If you entertain a doubt of that kind as to the guilt of the accused or any of them it would, of course, be wrong to convict him, but I need hardly say that a doubt springing from indecision or from disinclination to make up your minds is not a reasonable doubt. You have a clear and definite duty to perform, that is to say, on the evidence which has been placed before you, whether the accused or any of them are guilty of the three specific offences of cheating which are set forth in the charge. I am confident that you will apply your minds earnestly to this task and that you will bring in a verdict according to your consciences. Whatever your verdict may be, I venture to think it will command respect.

Before you retire, gentlemen, I should like to say that it is specially desirable that your verdict should be unanimous

and if you can come to a unanimous verdict, I hope that you will do so.

(The jury afterwards returned a verdict of guilty. Accepting the verdict, the Judge sentenced Clifford and Strachan to eight months' rigorous imprisonment on each charge, and Mower to six months' rigorous imprisonment, the sentences to run consecutively. On the application of the advocates for the accused, the Judge reserved and referred the following questions to the Full Bench and pending the decision of these questions, admitted the accused to bail.)

Order of Reference

Twomey, J.—After hearing counsel for the applicants, I am satisfied that the following questions of law should be reserved and referred for the decision of a Bench of this Court under S. 434, Criminal P. C.:

1*st*.—Whether the amendment of the charge in the Sessions Court was bad in law, and if so whether the accused were thereby prejudiced in their defence.

2*nd*.—Whether the presiding Judge erred in assuming it to be a substantial part of the case for the prosecution that a large amount, over 22 lakhs of rupees of the debts shown as good debts in the balance sheet of 30th June, were really doubtful or bad debts, and whether the accused had sufficient notice of this part of the case.

3*rd*.—Whether the presiding Judge misdirected the jury in instructing them as to the value and effect of Exs. 13 (a), 13 (bb), 13 (c) and 13 (dd) being the tabular statements showing the amounts of unpaid interest which, according to the witness, Holdsworth, were wrongly credited to profit and loss and treated as divisible profit.

4*th*.—Whether the sentences passed on the accused contravened the provisions of S. 71, I. P. C.

I do not consider it necessary to refer any other points.

The Officiating Government Advocate also granted the following certificates to the various accused as follows:

Government Advocate's Certificate granted to S. A. Mower.

Rangoon, 16th May 1913.

I hereby certify that, in my opinion, it should be further considered by the Chief Court, whether the learned Judge who presided at the Special Sessions held at Rangoon on 17th February 1913 and the following days for the trial of S. A. Mower and two others, erred in misdirecting the jury on the folling point.

1. In failing to direct that there wrs not sufficient evidence for them to deeide whether the principal sum of Mower and Co.'s debt to the Bank of Burma, Ltd., was bad to the knowledge of the accused at the date of tha issue of the balance sheet.

2. In directing that Mr. Meugens deposed that to say that interest on unsecured loans should go to interest suspense account, was tantamount to saying that these debts were doubtful.

3. In stating to the jury that "the Auditor is not there, for the Directors to lean upon" and in not directing the jury that the decision in *Dovey* v. *Cory* (1) governed the matter.

4. In directing them that they might legally draw presumptions under the provisions of S. 114, Evidence Act, as to S. A. Mower's knowledge of the facts constituting the offence charged, for which the necessary foundation had not been laid by evidence.

Government Advocate's Certificate granted to G. S. Clifford.

Rangoon, 23rd May 1913.

I hereby certify that, in my opinion, it should be further considered by the Chief Court, whether the learned Judge who presided at the Special Sessions held at Rangoon on 17th February 1913 and the following days, for the trial of G. S. Clifford and two others, erred in misdirecting the jury on the following points:

1. In failing to direct that there was not sufficient evidence for them to decide whether the principal sum in each of the following debts was bad to the knowledge of the accused at the date of the issue of the balance sheet:

(a) Attia's	Debt.
(b) Mower and Company's	,,
(c) Mount Pima Company's	,,
(d) Aung Ban Company's	,,
(e) Rangoon Refinery Company's	,,
(f) Major Meagher's	,,
(g) W. J. Cotterell's	,,
(h) Moberley's	,,
(i) Sevastapolos'	,,
(j) Andrew Stephens'	,,

(1) [1901] A. C. 477=70 L. J. Ch. 753=50 W. R. 65=85 L. T. 257 = 17 T. L. R. 732=8 Manson 346.

2. In directing that Mr. Meugens deposed that to say that interest on unsecured loans should go to interest suspense account, was tantamount to saying that these debts were doubtful.

3. In directing them that they might legally draw the presumptions arising out of the fcllowing passages:

From p. 10.—" Of course, the Manager of the Bank is supposed to be conversant with the financial affairs of the borrowers of the Bank and the fact that Attia in October, so soon after the balance sheet was issued, was in this difficult position, is a point for your consideratian. It is also to be remembered that Attia, some years before, had been intimately connected with Mower and Company itself. The state of this debtor's affair would probably be known to the Directors and the Manager of the Bank in a general way. They would be likely to follow the fortunes of such a debtor as this with special interest.

From p. 15.—" It is for you to decide whether on the information before him in July, Mr. Clifford could have foreseen that this was a probable outcome of the situation, knowing as he did know that the whole claim was disputed and knowing also that the Bank could not bring any serious pressure to bear on the British Burma Petroleum Co. without bringing that Company to the verge of ruin."

From p. 20.—" But such an inference, I submit to you, could be manifestly absurd, for it was not for Mr. Allen and Mr. Strachan, so much as Messrs. Mower and Clifford who were concerned, to prevent the Bank from collapsing and we way reject as wholly improbable any suspicion that Mr. Allen and Mr. Strachan would concoct a false halance sheet and keep the Directors in the dark about it."

From P. 24.—"Your common sense and business experience will enable you to decide how far actual knowledge of the state of the debts and securities, can reasonably be inferred from the opportunities which these two Directers had by reason of their connexion with the affairs of the debtor companies and their connexion with Attia and Botterell . . . . "But you will have to consider the likelihood of the Bank Manager decided for himself without reference to the sole Director in Rangoon such radical questions as the total amount of debt to be credited as good, the amount to be classed as doubtful or bad, and against which provisions should be made by way of reserve in a contingency fund."

From P. 25.—"It would be absud to hold the Director responsible for any mere details of Bank management, but in large matters such as I referred to just now, it is not unreasonable to presume that the Manager acted in consulation with the Directors."

"I think therefore that you must presume that Mr. Clifford, the sole Managing Director in Rangoon at this time did exercise the supervision and control that were vested in the Board of Directors and that in exercise of these functions he would naturally become conversant with all really important matters concerning the Bank."

"Well, gentlemen, whatever you think about the minor debts of the Bank it seems to me that you might reasonably infer that Mr. Clifford knew most of what was essential to know of the large debts those of Mower and Company, the Refinery, Aung Ban, Mount Prima, Cotterell, Moberley and Stephen."

Government Advocate's Certificate Granted to R. F. Strachan.

Rangoon, 3rd May 1913.

I hereby certify that, in my opinion it should be further considered by the Chief Court whether the learned Judge who presided at the Special Sessions held at Rangoon on 17th February 1913 and the following days for the trial of R. F. Strachan and two others, erred in misdirecting the jury on the following:

1. In failing to direct that there was not sufficient evidence for them to decide whether the principal sum in each of the following debts was bad to the knowledge of the accused of date at the date of the issue of the balance sheet:

(a) Attia's	Debt
(b) Mower and Companp's	,,
(c) Mount Prima Company's	,,
(d) Aung Ban Company's	,,
(e) Rangoon Refinery Company's	,,
(f) Major Meagher's	,,
(g) W. J. Cotterell's	,,
(h) Moberley's	,,
(i) Sevastapolo's	,,
(j) Andrew Stephens'	,,

2. In directing that Mr. Meugens deposed that to say that interest on un-

secured loans should go to interest suspense account, was tantamount to saying that these debts were doubtful.

3. In directing them that they might legally draw the presumptions arising out of the following passages:

From p. 10.—"Of course the manager of the Bank is supposed to be conversant with the financial affairs of the borrowers of the Bank and the fact that Attia in October, so soon after the balance sheet was issued, was in this difficult position is a point for your consideration.

From p. 15.—"So that full knowledge of the true state of affairs can hardly be imputed to Mr. Strachan though he admits, of course, that he did discuss the question about the disputed claim with Mr. Clifford and it is for you to form your opinion as to what Mr. Clifford must have told Mr. Strachan about it.

From p. 17.—"If it was doubtful then, I think it is a legitimate inference that it was more doubtful in June 1911 and Mr. Strachan, if anyone, was conversant with the affairs of this estate, having himself been receiver up to a period of six months before the issue of the balance sheet of the Bank which we are considering.

From p. 26.—"It was Mr. Strachan's duty as General Manager to be conversant with the financial position of persons and companies to whom money had been lent by the Bank and may fairly be presumed that he was posted at any rate in a general way in reference to all or most of the debtors."

Opinion

Hartnoll, Offg. C. J.— The applicants, G. S. Clifford, R. F. Strachan and S. A. Mower, have been tried before my learned colleague, Twomey, J., and a jury and have been convicted under three heads of cheating and dishonestly inducing delivery. of property, punishable under S. 420, I. P. C. They have been sentenced, the first two to eight months' rigorous imprisonment on each charge and the last to six months' rigorous imprisonment on each charge, the sentences to run consecutively. At the conclusion of the trial, my learned colleague reserved certain questions of law under the provisions of S. 434, Criminal P. C., and since then, the learned Government Advocate has certified that certain other points should be further considered under S. 12 of the Lower Burma Courts Act. The reference under S. 434 and revision cases arising out of the learned Government Advocate's certificates have been heard together. The applicants, Mower and Clifford, were Directors of the Bank of Burma which closed its doors on 14th November 1911 and Strachan was the General Manager of the same Bank. The cheating alleged and of which they have been convicted was that by means of a false balance sheet for the six months ending 30th June 1911 and by a false Directors report and by intentionally keeping the Bank open as a going concern after it had ceased to be solvent they dishonestly induced: (1) one Maung Tin Baw to deliver the sum of Rs. 5,000 to the Bank, (2) one John Cumming to deliver the sum of Rs. 40 and (3) one N. Mitter to deliver the sum of Rs. 100. The delivery by Maung Tin Baw was on 30th October 1911, by Cumming on 2nd November 1911, and by Mitter on 10th November 1911.

I propose to deal with the points referred and dealt with by the learned Government Advocate's certificates in the order in which they were argued. The first point is whether the learned Judge erred in assuming it to be a substantial part of the case for the prosecution that a large amount, over 22 lakhs of rupees of the debts shown as good debts in the balance sheet of 30th June were really doubtful or bad debts and whether the accused had sufficient notice of this part of the case. One of the acts of deception alleged was that the balance sheet showed that there was a profit of Rs. 1,62,277-12-5 for the half-year, whereas in reality there had been a loss of over Rs. 55,000 and that the way that this had been arranged was to credit to profit and loss unpaid interest due on bad or doubtful debts which should really have been put to an interest suspense account. One of the witnesses was the Official Liquidator of the Bank, Holdsworth, and it was on his initiative that the prosecution took place. He alleged certain other defects in the balance sheet which, in his opinion, showed its false and deceptive character. These were also gone into at the trial, but Twomey, J., as shown in his summing up, found that

they were not matters that should be considered in deciding whether the offence of cheating was established or not. He therefore found in applicants' favour as far as these other matters were concerned. The convictions have been obtained on the ground that unpaid interest on bad and doubtful debts has been dishonestly credited to profit and loss and rendered divisible as profit and also on the ground that the principal of these debts was treated as good in the balance sheet.

Holdsworth, to support the case, prepared amongst others three Exs. 13, 18 and 39. No. 18 is a statement setting out certain debtors of the Bank, the amount of their debts on 30th June 1911 and on certain subsequent dates, the securities lodged with the Bank to secure their repayment, their market price as regards quoted securities and nominal value as regards unquoted on the above-mentioned dates and the balance being deficiency in value of quoted securities. Ex. 13 is a series of statements showing certain of the debtors shown in Ex. 18, their balances on 1st January 1911 and 30th June 1911, increases in balances, debits including interest debited every month, credits, if any, and difference between debits and credits. Ex. 39 is a balance sheet drawn out by Holdsworth to illustrate the case put forward by him though he says that it is not in the form he would approve. It is allowed that it does not necessarily follow that because a debtor is in Ex. 18, his debt is considered bad or doubtful. In fact, it is allowed that some of the debts in Ex. 18 are good. The defence therefore say that Ex. 18 does not give them notice that there was according to the prosecution a large amount of bad or doubtful debts, that it merely shows unsecured balances, and that these unsecured balances may be good if the personal capacity or other resources of the debtors are taken into consideration ; that it was for the prosecution to prove that the personal capacity of the debtors or their other resources were negligible quantities in considering whether the unsecured balances could be realized. Ex. 13 is objected to, in that Holdsworth's standard was, that if a debt, or a portion of a debt, is not secured, the interest, if not paid, should always be placed to a suspense account unless it is certainly recoverable, and that standard is too high. It is objected that in saying that unpaid interest shown in Ex. 13 should go to a suspense account sufficient attention has not been paid to the other capacities of debtors to pay.

Exhibit 39 is objected to as it does not specifically show Nos. 2, 8, 68, 123 set out under head "Debts for which the Bank holds no security" as bad or doubtful. As regards Ex. 13 it was pointed out that if the principal of the debts was alleged to be bad or doubtful, credit should have gone to reduction of principal and not, as has in fact been done, in reduction of interest. It is allowed that certain amount of evidence has been led which goes to show that the principal of certain of the debts was bad, but it is argued, that some of this evidence was called to create prejudice with the jury. Mr. DeGlanville says that he thought it was called to merely corroborate Holdsworth. There seems to me to be no doubt that it was part of the case for the prosecution that the principal of the debts shown in Ex. 13 was bad or doubtful and that the accused had sufficient notice of this part of the case. It is not denied that in the Magistrate's Court this was part of the case, but it is urged, that, as S. 409, I. P. C, was abandoned in that Court, it was not understood that in the Sessions Court the principal of the debts would be again attacked. I would note here that in the Magistrate's Court, Holdsworth distinctly said that he did not consider the debts Nos. 2, 8, 68, and 123, which he classed as debts for which the Bank holds no security, to be good. It was contended that the words recorded have not this meaning and that they mean that he did not consider whether they were good or not, but the meaning appears to me to be clear enough. Evidence was given at the trial that interest on the principal debts had not been paid for a considerable period and this is a distinct indication that the principal may be bad or doubtful. It was an indication that should have come to the notice of the defence, and when further evidence was given that went to attack the principal, such evidence clearly meant that the principal was being attacked. As regards the debts referred to in the learned Government Advocate's certificate, I will refer to the

evidence as to their being bad or doubtful when I come to them. Ex. 14 shows that the personal capacity of S. Buckingham to pay was attacked.

As regards Britto no interest had been paid since 1st January 1910 and the proceeds of the jewellery pledged did not clear the debt. Evidence was given that W. H. Clifford had not paid interest for six months and that he wrote on 10th June 1911 and said he was not prepared to pay anything monthly at the moment. Evidence was produced to show the salaries of Moberley, Dennis, Gorse, Teehan, A. Stephen and F. Rajh. Holdsworth says he made inquiries into the position of Dennis, Gorse, and Moberley. Holdsworth describes how that as regards T.A. Fraser, with the exception of Rs. 248-12-0, paid on 12th November 1910, no interest had been paid since 1st January 1906. Some Rs. 1,300 worth of securities were sold in December 1910 and February 1911. The debt was Rs. 18,639 on 30th June 1911. Holdsworth describes how Mossop and Bartlett paid no interest from 1st December 1909 when the account started. He is taken through all the names. He says that he inquired into Rajh's position. Evidence is given as to Reid's salary. Letters are put in to show Teehan's position. Then when Holdsworth is cross-examined by Mr. Giles, he distinctly says that one of the grounds on which he alleges that the balance sheet is false and fraudulent is that some of the debts which were bad were treated as good. Peters was asked about his means and was cross-examined as to his resources. Tsounas was also called and examined as to his means. Sen was called to prove the badness of G. Stephen & Son's estate. All the above evidence clearly involved the goodness or doubtful character or badness of the principal, and it is not now for the defence to turn round and say that they did not have notice. From Twomey J.'s notes, the Government Advocate in his opening speech said that the balance sheet drawn up by Holdsworth showed a loss of Rs. 55,000 instead of a profit of Rs. 1,62,000, that is, if due allowance is not made for bad debts—if due allowance is made for bad debts, the result would be much worse. On the 26th February Twomey, J.'s notes show that he held, the question of the badness or doubtful character of the debts shown in Ex. 13 was in issue. This was in answer to an objection by the defence. Twomey, J. does not remember whether he read the order out, he says he did not sometimes read out his orders in extenso. I would also refer to his notes of the 26th March and 2nd April. The mere fact that Holdsworth in Ex. 39 dealt with the interest and not specifically with the principal as bad or doubtful should not, in my opinion, be held to be a sufficient ground for considering that there are reasonable grounds for holding that the defence were misled in consideration of the facts I have set out and am going to set out in discussing the evidence as to the badness or doubtful character of the debts in the Government Advocate's certificate.

I will now deal with the first ground referred by my learned colleague.

Whether the amendment of the charge was bad in law and if so, whether the accused were thereby prejudiced in their defence ?

The words objected to are "and by intentionally keeping the Bank open as a going concern after it had ceased to be solvent." In p. 3 of the summing up, my learned colleague deals with these words, and there he expressly says : "You cannot find the accused guilty of cheating as charged unless you are satisfied that the balance sheet was in fact false to the knowledge of the accused." Nearly at the end of the charge he said: "As I have already laid down, you are not justified in finding any of the accused guilty unless the balance sheet is proved to your satisfaction to be false. As I have said before, the mere carrying on after the 30th June would not by itself constitute cheating. The carrying on after 30th June must be considered only with reference to the balance sheet and the knowledge which can be imputed to the accused as to the character of the balance sheet. The case hinges entirely on this balance sheet, i. e., on your decision as to whether it was really false and deceitful. If you find that it was not, the accused should all be found not guilty." It is urged that these words are only expressions of opinion, and that the jury may have found the accused—especially Mower—guilty on the ground that the Bank was kept open after it became insolvent ; but I cannot allow this plea. The words are not an expres-

sion of opinion but are a clear direction of law not to find the accused guilty unless they found the balance sheet false. The meaning to be attached to the words was explained. I am therefore unable to hold that they may possibly have misled the jury in giving their verdict. As regards the actual words themselves, it is objected that they have let in evidence of events that took place after the signing and issue of the balance sheet, and that such evidence is irrelevant. I am unable to hold that such evidence is irrelevant. The allegation is that the profit in the balance sheet was fictitious as it should all have gone to suspense account, being interest unpaid and due on bad and doubtful debts. This was the deceit. The evidence as to subsequent events was to show that the position grew worse, that the debts became more and more doubtful and bad till the last deposit was made, that is, that the deceit being practised on the public of showing the Bank in a flourishing condition became worse. In these circumstances I am of opinion that it was open to the prosecution to prove such subsequent events and the accused's knowledge of them as part of the deceit being practised, and also as showing the continuance of dishonest intention on their part.

I will now turn to the matters dealt with in para. 1 of the certificates of the Government Advocate given in the cases of Clifford and Strachan.

Attia's Debt.—There is the evidence set out in the summing up. It should be observed that the guarantee by Mower & Co., dated 1st August 1906, extends to the whole of Attia's debts. This guarantee would clearly be a reason for Mower & Co. keeping touch with Attia and his affairs. Ex. 46 (c) shows that Attia had a big stake in Mower, Cotterell & Co., in October 1910, and the exhibits down to Ex. 58 and Ex. 93 show how he was interested in the same ventures. He signs as a Director in the Aung Ban Oil Co., in March 1910. Ex. 89 (b) shows how the bank did business and may be taken as an indication of the relations between Attia, and the accused. Attia also appears in Ex. 85 (c). The evidence seems sufficient for the jury to draw a conclusion.

Mower & Co.—Besides what is stated in the summing up, there is Ex. 26 (a) which was put in by Holdsworth early. This surely is a most important document by which the jury would be able to Judge whether Mower & Co., had extraneous resources to meet its unsecured debts. Then again Ex. 23 goes to show that prices had been falling from January 1911 and this factor might well be taken into consideration by the jury in gauging the resources of Mower & Co. Ex. 26 (a) does not merely deal with the position in October 1911, but from 1909. Holdsworth said that Clifford had told him that Mower & Co., had lodged all available security with the bank and this evidence is corroborated by Clifford's letter of 13th February 1912 to the shareholders, (Ex. 6) from which it is clear that the bank called upon Mower & Co., and indeed on all debtors to furnish further security as the values of securities declined. As regards Clifford's knowledge, Exs. 45 to 60 show how interested he was in the companies, the shares of which the bank held as securities. It is reasonable to conclude he would know of their condition and market prices. Considering the extent the bank was interested in them, surely it is reasonable to think that he would consider what effect falls in value would have on the bank.

Mount Pima Company. — Before the examination of Allen there was Ex. 15 which showed that the company was unsuccessful and that Mower & Co., had made over their claim as sole creditors. Interest had not been paid for some time. Surely this was evidence attacking the principal. After Allen's evidence, taken with that given before, there seems to have been sufficient evidence to go to the jury.

Aung Ban Oil Company and Rangoon Refinery Company.—The summing up shows what evidence there was, and that was sufficient to go to the jury to form a conclusion as to whether the debts should be classed as bad or doubtful. But Mr. Giles contended that my learned colleague misdirected the jury in not directing them that these debts were recoverable from any or all of the shareholders. The Government advocate has not certified that the direction by my learned colleague on this point should be further considered by this Bench ; but Mr. Giles was allowed to argue that there was such a misdirection. The evi-

S. N. BAR. B. A. LL. Distt. High Court, SRINAGAR (Kashmir

dence in connexion with the distribution of the shares in the British Burma Petroleum Company to the share holders of the Aung Ban and Rangoon Refinery Companies is contained in the cross-examination of the witnesses, Holdsworth and Maunder. Holdsworth says that a large number of the 1,00,000 shares received from the British Burma Petroleum Company as the price of the Aung Ban Oil Company's undertaking were distributed in dividends to the shareholders of the Aung Ban Oil Company.

He also stated that he was considering whether he should take steps to enforce the claim of the bank against the Aung Ban Oil Company. The Rangoon Refinery Company sold its undertaking to the British Burma Petroleum Company for 4,35,000 shares in the latter company and Maunder says that about 2,94,000 of these shares have been distributed by the liquidatcrs amongst the shareholders of the Rangoon Refinery Company by way of an interim dividend. Now, it is perfectly clear that Mower and Clifford knew of the payment of these interim dividends. They were prime movers in the formation of the British Burma Petroleum Company and were according to Exs. 48 and 50 shareholders in the Aung Ban and Rangoon Refinery Companies, Mower having large holdings. They were two of the Bank's Directors and it is clear to me that the bank acquiesced in the payment of these dividends. Ex. 85 (a) shows that as regards Seymour Buckingham's account, his Rangoon Refinery shares held by the bank as security were exchanged for British Burma Petroleum shares and his Aung Ban shares were similarly transferreed. Ex. 88 (d) and Ex. 18 (a) show that Peters' Rangoon Refinery shares held by the bank must have been transferred tor British Burma Petroleum shares. Ex. 85 (e), said by Holdsworth to be G. Clifford's account, shows that 1,405 Rangoon Refinery shares were exchanged for 1,686 British Burma shares and 600 Aung Ban shares for 690 British Burma Petroleum shares. According to Ex. 22 the bank held some 4,00,000 British Burma Petroleum shares. Ex. 50 shows that the bank itself held 45,058 shares in the Rangoon Refinery Company. It is extremely probable that many of the British Burma Petroleum shares held by the Bank were received in exchange for shares of the Aung Ban and Rangoon Refinery Company's shares held by them.

The record shows that the bank never objected to the distributions by the liquidators and never entertained any intention or idea of pursuing the British Burma Petroleum shares into the hands of those who recieved them with a view to satisfying their debts due from the Aung Ban and Rangoon Refinery Companies. Their action in waiving the claim of the Rangoon Refinery Company against the British Burma Petroleum Company, which amounted to over £70,000, for a sum of £5,000, indicates clearly that they never intended proceeding against the shareholders as it seems that such action effectually prevented them from doing so. If they had only recovered about half of the £70,000, the debt would have been satisfied. Their acquiescence may possibly have been due to the fact that they considered, the liquidators would be able to meet the debts. The liquidators had large claims against the British Burma Petroleum Company in respect of the Aung Ban Company as well as in respect of the Refinery Company which, it would appear from a consideration of Holdsworth's evidence, p. 2, Williamson's evidence, p. 4 and Ex. MMI, p. 8, were not met in full to a considerable extent. It is impossible to disregard the inter-relations of all the parties. W. J. Cotterell and C. Clifford were the liquidators. Mower and Company were the Managing Agents of the Aung Ban Company according to Ex. 48. Mower, Cotteroll and Company, of whom W. J. Cotterell was a partner, were the Managing Agents of the Rangoon Refinery Company according to Ex. 50, Page 4 of Ex. MMI, shows how Mower and Company knew of the conduct of affairs by the liquidators, for as regards the expenditure on the Refinery, the report runs: "The payments when made however all came to the notice of Mower and Company and they doubtless satisfied themselves that they got value for the work done." The consideration arises, that, if it had not suited the bank's interest, they would not have assented to the change of shares without protest or inquiry.

Considering that the bank acquiesced and all the circumstances of the case, I think it extremely improbable that the bank could have proceeded success-

fully against the shareholders. This is in effect the same conclusion as is contained in my learned colleague's charge to the jury and I therefore, see no reason for interference on this ground.

Meagher.—The evidence is in the summing up and is, in my opinion, sufficient to go to the jury. It is objected that my learned colleague should have referred specifically to some of the evidence. The whole of it was before the jury and it cannot be expected that every particle of evidence can be put to the jury.

Cotterell.—Besides what is said in the summing up, there are the facts that he had paid no interest since August 1910, and that he is down in 85 (c), coupled with the fact that a close business connexion is shown between him and Mower and Clifford in Exs. 45 to 60, which would cause them perhaps to have a knowledge of his affairs and so indirectly cause Strachan to do so through his directors. According to Holdsworth p. 25, he could not clear his account at once.

Moberley.—There is nothing more to be said than is set down in the summing up.

Sevastopolo.—In addition to what my learned colleague said, the counsel for the Crown has brought to our notice that more than half the debt was unsecured.

A. Stephen.—More than half the debt was unsecured and no interest except from realization of securities was paid after January 1910. Mr. Giles drew attention in the course of his argument on this debt that my learned colleague, in his remarks on the debt, relied on a passage in the witness Sen's evidence that was not relevant, when he said in re-examination : "When the Official Receiver considered it doubtful whether the estate was solvent." This point was not one of those certified by the Government Advocate as one that should be further considered. The last sentence of his cross-examination was : "When the Bank of Burma was appointed Receiver, G. Stephen and Son's estate was considered solvent because the debtors were considered solvent and rightly in my opinion." That opinion must have been based on Sen's knowledge of the papers in his office and on his opinion of the value of the assets at that time. In re-examination after the passage objected to, Sen said that the Official Receiver took over charge in December 1910. Then Sen was not Official Receiver, but he would still be competent to give the effect of the records in his office and state the official opinion that was come to on these records at the time the office took over the estate. The answer was never objected to as far as the record shows. If such objection had been made, the sources of his knowledge might have been gone into. I am not satisfied that the passage of the evidence objected to was inadmissible.

There is Ex. 30 to consider in connexion with all these debts.

To sum up, I consider that there was evidence to go to the jury with regard to all these debts though it was meagre in the case of Sevastopolo and A. Stephen.

I now turn to the second point certified by the Government Advocate for all three accused.

It is objected that the sentence in Meugen's evidence, referred to three times in the summing up, is different to an earlier statement of Meugens, and that both statements should have been put to the jury. I do not think that there is anything in the objection. The earlier statement was made in respect of a loan which was covered by security in respect of the principal and not the interest. In Ex. 30 the interest on unsecured loans is referred to and he is speaking with regard to Ex. 30.

I would now deal with the third point referred by my learned colleague. I have already set out what the Exs. 13 are and have discussed them. Mr. Giles' contention is that they were prepared on the principle that unless the interest was certainly recoverable, it should not go to profit and loss, that this high principle vitiates the whole of it, and that unless it was considered in the light of Holdsworth's explanation, it should not have been put to the jury at all. Looking at Holdsworth's evidence as a whole and especially that portion of it at p. 18 of his printed evidence, I am of opinion that he does not differ very much from the other experts. He, no doubt, said that interest should be certainly recoverable before it was credited to profit and loss, but he also said that it might be so credited if a debtor had all his ready cash for the moment tied up or if he was

a man of whom there was no doubt as to his financial stability. Mr. Giles argued that the statements should not have been put to the jury as there was no attempt to prove, the debts were bad or doubtful. It seems to me that the exhibits were put to the jury in the right way. They were used to show the amount of interest that it was alleged should have been put to interest suspense account on the ground that the debts themselves were bad or doubtful, whereas it was really credited to profit and loss, and the jury were asked to consider which portion of the debts themselves were bad or doubtful as in that case the "unpaid interest relating to such portion ought to have been taken to interest suspense or deferred interest account or at any rate ought not to have been treated as divisible profit in the profit and loss account." An attempt was made to prove that the debts themselves were bad or doubtful and this is where Mr. Giles' argument fails.

I now turn to the certificate granted by the Government Advocate in the case of the accused Mower.

The first point I have already dealt with. There was evidence, in my opinion, from which the jury could, if they so desired, come to a conclusion as to whether Mower's debt was good, bad or doubtful ; and as regards knowledge of Mower, it is not an unreasonable assumption that he would know the affairs of his own firm and of the securities that were pledged with the bank as security for the firm's debt that he would know the fall in the value of the securities from January 1911 and the position of his firm as set out in Ex. 26 (a). Then there are the letter, Ex. 30—whether he saw Ex. 30 or was told of its contents was a question for the jury to decide—and the conduct of his wife with regard to her moneys as also the other inferences that could be drawn as set out in the summing up.

The second point in Mower's certificate I have already dealt with.

The third is that my learned colleague erred in stating to the jury that " the Auditor is not there for the Directors . . . . . to lean on " and in not directing the jury that the decision in *Dovey* v. *Cory* (1) governed the matter. The summing up which was very lengthy must be taken as a whole. In the passage referred to, the learned Judge was explaining how one of the main duties of an auditor was to protect the shareholders. I am unable to hold that the jury were misled by the words complained of, nor can I see that the case of *Dovey* v. *Cory* (1) governs the matter. In that case the allegation that Cory was a party to the fraud was withdrawn and no moral obliquity was imputed to him at the hearing of the appeal. In this case actual fraudulent conduct is alleged against Mower — that he knew the balance sheet was false when he signed it. The jury were told to acquit him if they had any reasonable doubt about this matter. I cannot see that there has been any misdirection in dealing with *Dovey* v. *Cory* (1).

I now come to the matter of presumptions dealt with by the Government Advocate's certificate and I would say, to commence with, that the summing up must be read as a whole, and that my learned colleague more than once said that his opinion was not binding on the jury. At p. 26 of the summing up he said: "I am entitled to give my opinion on this point and on other points of facts, but it is an opinion which does not bind you as I said before and you can reject or follow it as you think fit." Also it must be remembered that all the evidence that was before the jury was not always referred to in connexion with the passage complained of.

CLIFFORD'S CERTIFICATE.

1*st Presumption.*—I cannot see any objection to the first sentence. As regards the next two there were before the jury the facts and considerations I have set out in discussing Attia's debt. Giving them due weight I am unable to hold that there was any misdirection.

2*nd Presumption.*—I can see nothing wrong in the words. Clifford had a full knowledge that the claim was disputed and of the affairs of the Refinery and British Burma Petroleum Companies.

3*rd Presumption.*—This was an opinion, and a strong one, expressed by the Judge ; but it must be remembered that the jury were told that they were not to be bound by his opinion and that they could follow or reject it as they chose.

4*th Presumption.*—I can see nothing to object to in the first sentence. There were facts before the jury from which to deduce knowledge as I have shown above

in this order. The second sentence appears to me to be in order, the more especially considering the great knowledge Clifford had of the various companies, the shares of which the Bank held as security for the different debts.

5*th Presumption.*—The words I have just written are equally relevant to the first sentence, and also the second, nor can I see any good reason for objection to the third sentence except perhaps the reference to Stephen.

STRACHAN'S CERTIFICATE.

1*st Presumption.*—I have already dealt with it.

2*nd Presumption.*—It was left to the jury to form what opinion they liked.

3*rd Presumption.*—Strachan certainly would be conversant with the estate and and its affairs, and as I have said the Judge expressly told the jury that they were not to be bound by his opinion.

4*th Presumption.*—The words appear to me to be justifiable. They are very general and broad.

MOWER'S CERTIFICATE.

1*st and* 2*nd Presumptions.*—I have already dealt with them.

3*rd Presumption.*—The inference the Judge drew was based on facts nor was the jury bound by it. He just before said that he had introduced his remarks to assist them in deciding the two Directors' actual knowledge.

4*th Presumption.* — I have already dealt with it ; but I would say that this passage must be read with what preceded it. There were grounds based on facts for saying that Mower had great knowledge of the state of the companies the shares of which the Bank held as security.

5*th Presumption.*—The passage must be taken with what succeeds it, and the whole passage seems to me to be one that it was quite fair to put forward for the consideration of the jury.

6*th Presumption.*—It must be remembered that in addition to the letter Ex. 30, Allen had advised the nonpayment of a dividend. The jury were asked to consider and not ordered to draw any presumption. The second sentence may perhaps be too strong when the word practice is used ; but there was no such misdirection as could possibly influence the jury in their verdict.

7*th Presumption.*—I can see no objection to the passages and moreover they were merely an expression of opinion which the jury were told to follow or not as they chose.

8*th Presumption.*—I can see no objection to these passages. They must be read with what had been said before. There were facts from which the jury could come to a conclusion. It was a matter of constructive knowledge. There was evidence of facts from which an inference could be drawn. In saying that Mower was not a mere dummy there was evidence as has been put before us to show that he was not a mere dummy. His large interests alone in the various companies would lead to such a conclusion. Ex. AA (2) makes Mower the senior partner. The minute book of the Bank shows Mower presided at meetings.

9*th Presumption.*—It is objected that the evidence is irrelevant. I am unable to hold that it is. The sum was large, over Rs. 70,000. It was at 7 per cent. Mower returns on 1st August. On the 11th, measures began to be taken to move it out of the Bank and place nearly all of it in Government paper at 3 1/2 per cent. Mower is a Director of the Bank. The point at issue is whether the balance sheet signed on 1st August was false and fraudulent to Mower's knowledge. The relevancy of the fact seems to me to be obvious.

There remains for consideration the last point referred by my learned colleague.

"Whether the sentences passed on the accused contravened the provisions of S. 71, I. P. C. ?"

I have no doubt that they do not do so. The essence of the offence, under S. 420, I. P. C., is cheating and dishonestly inducing the person deceived to deliver property. Here not one but three persons were deceived and induced to deliver property, and each one was induced to deliver his property at a different time. It was not one sum of money that was delivered but three different sums. The argument that there was only one deceit practised in respect of all three persons does not seem to me to bring the dishonest inducing of three separate persons within the first part of S. 71, I.P.C. It is Illus. (b) to that section, in my opinion, which governs this case and not Illus. (a).

In the result I see no reason for any interference and would now commit the

applicants to jail to undergo the sentences passed on them.

Ormond, J.—The 2nd and 3rd questions referred by the Judge relate to the objection of the defence that they were not given to understand that it was part of the case for the prosecution that the principal of the debts mentioned in Ex. 13 was doubtful or that the interest on these debts due for the six months previous to 30th June 1911 was doubtful, except in so far as interest on such debts had not been paid and the debts were unsecured. Exs. 13 were admittedly prepared by Holdsworth to show what interest should have been put to an interest suspense account instead of to profit and loss account. Mr. Giles relied upon Holdsworth's statement that unpaid interest on an unsecured debt should go to an interest suspense account unless there are very good reasons for believing that such interest is recoverable: Even so I think the prosecution would be bound to show that there were no good reasons for such belief on the part of the accused; or in other words, to show that such interest was doubtful to the knowledge of the accused. And the only practical way of showing that the interest was doubtful would be to show that the principal of such debts was wholly or in part doubtful. Evidence was adduced by the prosecution to show that the principal of each of the debts mentioned in Ex. 13 was doubtful, except Murray's—Murray was called by Mr. Giles to show that his debt was good: in order to show that Holdsworth's reasons for putting unpaid interest to a suspense account were deficient; and he cross-examined the witness for the prosecution as to the quality of the debts in order to show that the interest on these debts could honestly have been thought to be recoverable. This would lead one to suppose that he must have known that the prosecution were trying to show that these debts were doubtful in order to show at least that the interest on them was doubtful. Mr. Giles seems to have assumed that such evidence was adduced by the prosecution principally in order to prejudice the jury; but I cannot see any ground for this assumption. Mr. DeGlanville understood that the purpose for which the prosecution adduced evidence as to the doubtfulness of the debts mentioned in Ex. 13 was, to show that the interest should have gone to suspense account; and to show that the basis adopted by Holdsworth, in putting unpaid interest on unsecured loans to suspense account, worked out correctly.

It must be remembered that T. A. Fraser's interest was included by Holdsworth in Ex. 13 (bb) because he thought it doubtful; and that the principal of this debt is not included in Ex. 18 (a) because he could not say that the principal was not fully secured—whilst the unsecured debts of the Rangoon Oil Company and Solomon on which the interest was unpaid are not included in Ex. 13 because Holdsworth considered those debts good. This should have been sufficient to show the defence that Ex. 13 comprised a list of debts prepared by Holdsworth (principally no doubt, though not invariably, upon the basis of the debts being unsecured and the interest unpaid),—in order that the prosecution should prove that the interest on these debts was doubtful, and should therefore not have been put to profit and loss account. In Exs. 13, Holdsworth has credited payments to interest which in strict accounting should have been credited to the principal, if the debts were doubtful. This however could not have been taken by the defence as an admission by the prosecution that the debts in Exs. 13 were good. Exs. 13 were prepared for a certain purpose, viz., to show the least amount of interest that should have gone to an interest suspense account,—and the crediting of payments to interest was by way of a concession to the defence. In the Magistrate's Court Holdsworth prepared a "model" balance sheet which shows a loss of Rs. 55,000 odd instead of a profit of Rs. 1,62,277 which would be the result, if the interest on the debts in Exs. 13 were put to suspense account instead of to profit and loss. If the principal of those debts was doubtful and put to a reserve account, the loss appearing in this balance sheet should appear as being so much more. But this Ex. 39 cannot have been taken by the defence as an admission by the prosecution that the principal of these debts was good, for the document was prepared at a time when the prosecution alleged criminal breach of trust, which necessarily involved the badness of these debts. Moreover, Holdsworth explained that

he omitted the words "considered good" against the item of 28 lakhs because as he said in the Magistrate's Court—he did not consider these debts good; and as he said in the Sessions Court, because he was not dealing with the question whether the debts were good or bad; and later on he explains that he prepared Ex. 39 with reference to two questions, the interest suspense account and what amount of debts were secured or unsecured.

In answer to Mr. Giles, Holdsworth says: "One of the grounds on which I allege the balance sheet is fraudulent and dishonest, is that some of the debts which were bad were treated as good." He was then being cross-examined as to securities, so his answer, I think, clearly had reference to the principal of the debts and not merely to debts of interest. And in the Judge's notes it is recorded at an early stage of the proceedings that the doubtfulness of the debts had been a fact in issue all along. It is true that the prosecution have not specifically stated what debts they asserted to be doubtful but they adduced evidence to show that many of the debts in Ex. 13 were doubtful and the defence could have had no doubt that any debts asserted by the prosecution to be doubtful must be included in the exhibits. Murray was called by the defence to prove that this debt was good—his subpoena was taken out on 17th February—and at a later stage the defence sent for Major Meagher from Madras to prove that his debt was good. Allen was examined by the defence to prove that in his opinion the other debts were good; and they could have called other evidence if they had been so minded. The doubtfulness or goodness of the debts in Exs. 13 was gone into both by the prosecution and the defence. In my opinion the question as to the doubtfulness of the debts in Exs. 13 was necessarily involved in the question whether the interest on those debts should have been put to an interest suspense account instead of to profit and loss, which was admittedly part of the case for the prosecution. I think that the defence have no good reason for saying that they were misled by the conduct of the case for the prosecution into the belief that it was no part of the case for the prosecution that the debts in Exs. 13 were doubtful.

The first question referred by the Judge relates to the amendment of or addition to the charge. The amendment was fully and clearly explained by the Judge to the jury: see pp. 3, 20 and 29 of the printed copy of the summing up. It is urged that the jury might have given their verdict upon a finding simply that the Bank had been kept open and received deposits when insolvent: the answer is, that that was never the case of the prosecution and the jury were in effect told emphatically that they were not to do so. The Judge told the jury that the case hinges entirely upon the balance sheet; the keeping open of the Bank was put to the jury as a continuing invitation to persons to make deposits upon the strength of the representation contained in the balance sheet as to the Bank's financial position; and if the balance sheet was false and fraudulent, the keeping of the Bank open was an aggravation of the dishonesty of the balance sheet (it being admitted that the financial position of the Bank became steadily worse subsequent to the time of the signing and publication of the balance sheet). The Judge also directed the jury that they must be satisfied with regard to each of the accused that he knew the balance sheet to be false when he signed it.

It is urged that the amendment of the charge let in evidence as to the subsequent financial position of the Bank and as to subsequent knowledge of the accused, which would not have been admissible for the purpose of showing the financial position of the Bank on 30th June previously, or the knowledge of the accused at the time of the signing and publishing of the balance sheet. Evidence as to the subsequent financial position of the Bank would, in my opinion, be evidence to go to the jury in order to determine its financial position on 30th June previously; and would also be relevant as to the dishonesty of the accused at the time of accepting the deposits. The amendment of the charge was, I think, merely an amplification of the charge. The accused were charged with obtaining three deposits on three separate occasions by means of a false representation contained in the balance sheet; it was a continuing representation up to the time of the deposit, and, in my opinion, operated as a representa-

tion at the time of the deposit, as to the financial position of the Bank on 30th June. If a Director innocently signs a false balance sheet but subsequently comes to know that it is false, it becomes a false representation by him from that time. The knowledge of the accused as to the falsity of the balance sheet should therefore be determined as at the time of the deposit; aud I think that the Judge should have directed the jury to that effect. The direction of the Judge that such knowledge should be determined as at the time of signing or issuing the balance sheet was however in favour of the accused. The financial position of the Bank and knowledge of it by the accused at the time of the deposit were also, I think, relevant facts; for if the deposit is not dishonestly received, there is no cheating. In my opinion the amendment of the charge was not bad in law and the accused were not prejudiced thereby.

The last question referred by the Judge is whether S. 71, I. P. C. is contravened by three consecutive sentences having been passed on each of the accused: the offence in respect of each of the three deposits was a separate and distinct offence and therefore S. 71 has not been contravened. I have no doubt that the Judge when awarding the sentences considered them in the aggregate; and, I think, it would have been more appropriate if the accused had been sentenced to the aggregate amount of the three sentences in respect of each offence, the sentences to run concurrently.

The first question referred to us under the certificate of the Government Advocate in the case of Clifford and Strachan is whether the Judge misdirected the jury in failing to direct that there was not sufficient evidence for them to decide whether certain debts were bad etc. This means: was there any evidence to go to the jury upon which they could come to such findings? In my opinion there was such evidence as to each of these debts. If so, that disposes of this question, but Mr. Giles was allowed to argue that the Judge had otherwise misdirected the jury on certain matters in connexion with some of these debts. This Court has no power of revision in cases tried by it in its original criminal jurisdiction, except such as given to it by S. 433 of the Code and by S. 12, Lower Burma Courts Act. Such power must be construed strictly and as being limited to the necessity of the case when determining the question or questions of law referred. In my opinion the Court has no power to question the decision of any points of law other than those referred by the Judge or referred under the certificate of the Government Advocate. As regards the application of the decision in *Dovey* v. *Cory* (1) that case decided that a Director may trust his co-Directors and if he is in fact ignorant of the fraud perpetrated by them, he is not liable in damages. The question left to the jury in this case was: If the balance sheet was fraudulent, had the three accused respectively knowledge of its falsity? I fail to see how the decision in that case of *Dovey* v. *Cory* (1) governed the present case, or that the Judge misdirected the jury as to the law in connexion with that case.

I see no misdirection in the Judge's reference to Mr. Meugen's evidence. I understand Mr. Meugen's evidence on this point to be, that if interest on a debt is credited to deferred interest account, it follows that the principal should be reserved against as a doubtful or bad debt unless there is security sufficient to cover the principal; and that crediting interest on secured loans to interest suspense account presupposes that they are debts.

With regard to the "presumptions" referred to in the Government Advocate's certificates, they are inferences which the Judge suggests to the jury should, or could be drawn from certain facts. One of the directions complained of is at p. 10 of the printed summing up where the Judge says that "the Directors and the Manager of the Bank would be likely to follow the fortunes of such a debtor as Attia with special interest." If the only fact to support this inference was that Attia some years before had been connected with Mower & Co. itself there would be no evidence to go to the jury to find knowledge on the part of the accused as to Attia's financial position in June 1911. But the summing up must be read as a whole and there was other evidence to support a finding as to such knowledge. The Judge impressed upon the jury that they alone were to decide the facts and to draw such inferences as they thought reasonable. As

to the other alleged misdirections mentioned in the certificate of the Government Advocate, in my opinion, they are not misdirections. There is evidence in each case from which the jury could draw the inferences suggested. I would dismiss these applications.

Amendment of Charge

Twomey, J.— The reasons for amending the charge are as set out in the summing up. Seeing that the condition of the Bank grew steadily worse in the interval between the issuing of the balance sheet and the receipt of the deposits—two to two and half months later—it seemed to me that this fact was highly relevant in determining the intention of the accused when they accepted the three depositor's moneys in October and November. The three offences were incomplete until then, and if the balance sheet was issued dishonestly the dishonesty was aggravated by keeping the Bank open when its condition was worse even than its true condition on 1st August. The representation made by the balance sheet was that the Bank was in a sound state and there was a continuing representation to this effect up to the time when the deposits were paid in. But the jury were strictly cautioned against finding the accused guilty on this part of the charge alone. They were told also that they need not concern themselves as to the precise date on which the Bank actually became insolvent in the sense that all its capital and reserves were exhausted. This question was not fully investigated at the trial and I do not think it was a material question. It was shown that the Bank, if not actually insolvent, was at any rate in a desperate plight when the deposits were received.

If after the balance sheet had been issued, the Bank had a sudden access of prosperity which placed it in a sound condition by the time the deposits were received there would then have been no cheating. For though the accused may have intended to cause wrongful gain or wrongful loss when they issued the false balance sheet this dishonest intention could no longer be imputed to them at the time of accepting the deposits if the state of the Bank at that time agreed with the representation made by them. It appears to me that the dishonest intention in August would not be punishable as cheating if the intention at the time of accepting ths deposits was not also dishonest.

Allegation that accused were misled by extension of charge

As regards the principal of the debts we have heard the learned counsel for the defence at great length on their complaint that this part of the prosecution case was left in obscurity until a late stage of the trial and then suddenly sprung upon them. It is true that printed statements were put in embodying in statistical form the witness Holdsworth's opinions as to the amounts which ought to have been shown as "secured" and "unsecured" and the amounts which should have gone to an interest suspense account, but we have no specific statement anywhere in the evidence of the amount of principal which should have been shown as doubtful or bad or else should have been reserved against. But it is clear that evidence was led in the Magistrate's Court for the purpose of showing that the unsecured portions of the debts in Ex. 13, etc., were doubtful or bad, and this evidence was repeated at the Sessions trial. The accused Mower's learned advocate admits that the principal of the debts was called in question in the Magistrate's Court with reference to a proposed charge under S. 409, I. P. C., and that this evidence was also relevant on the question of crediting unpaid interest to profit and loss. No charge was framed under S. 409, but the interest question was admittedly a main ground of attack by the prosecution in the Sessions trial no less than in the committing Magistrate's Court. The evidence as to the principal of the debts being relevant on that question in the Magistrate's Court was equally relevant in the Sessions Court, and that being so, I think the Court was bound to consider this evidence in all its bearings, that is to say, the Court had to determine whether the unsecured part of the principal should have been treated as doubtful in the balance sheet, and not merely with the question whether the interest on these debts should have been put to interest suspense.

The learnsd advocate for Clifford and Strachan does not admit that any question as to the doubtfulness or badness of the principal was ever put in issue by the prosecution. He contends that the evidence on this part of the case was

called merely for the sake of prejudicing the minds of the jury against the accused. He also urges that this evidence goes but a very little way towards establishing the doubtfulness of the debts, and that the defence could not be expected to see that the principal of the debts was really impugned where the attack was so feeble as to be beneath contempt. But the cross-examination of the first witness, Holdsworth, indicates that there was at any rate at that time no illusion as to this part of the prosecution case. It seems to me that it was clear on the surface of the case that the unsecured portions of the debts shown in Ex. 13 (a) etc., were challenged by the prosecution as doubtful or bad debts throughout the trial and that no mystery was made about it. These exhibits include all the debts which were admittedly reckoned as bad by the Bank itself at the July audit, and as regards the other debts it was a matter of clear inference that the prosecution challenged them as doubtful. For it is only when the unsecured portion of a debt is doubtful that any question arises of putting the unpaid interest on it to interest suspense, and this was in fact the line taken throughout the trial by the defence no less than by the prosecution. I therefore adhere to the opinion I expressed in summing up the case that the complaint of surprise is unfounded.

Value and effect of Exs. 13 (*a*), *etc.*

With reference to Ex. 13 (a) and the connected statements relating to unpaid interest, I concur in Ormond, J's., remarks. I think he has analyzed correctly the arguments placed before us with reference to these exhibits. The fact that the debts in Ex. 13 (a), etc., were to a large extent unsecured and that the interest accruing on these debts had remained unpaid for a long time were indications that the debts were doubtful. These were, no doubt, the primary grounds for Holdsworth's opinion that the interest should have been provided for in an interest suspense account and not taken as earned income. But the prosecution did not let the case rest on these indications alone. They produced evidence both before the Magistrate and at the trial to show that the debts were doubtful debts, and the defence endeavoured to rebut this evidence in some cases. Exs. 13 (a), etc., were put to the jury as showing the amounts of the debts and the amounts of unpaid interest and the credits to the various accounts during the half-year and it was left to the jury to decide on all the materials before them whether the prosecution had made out their case that the debts were in fact doubtful or bad to the knowledge of the accused.

It is said that Holdsworth treated all the debts in Exs. 13 (a), etc., as good debts except the Refinery Company's debt because in Ex. 13 (dd) he gave credit towards interest for all payments during the half-year except on the case of the Refinery debt. It would have been more logical if he had treated all the debts as he treated the Refinery debt, and the reasons which he gave for the difference of treatment are unconvincing. I mentioned this point to the jury. But his intention was clear enough. It was to show the amount which, in his opinion, ought to have gone to interest suspense on the assumption most favourable to the accused, namely, the assumption that all receipts during that half-year may properly be reckoned in reduction of the accrued interest instead of being reckoned as part satisfaction of the principal, the latter being the natural course to follow in the case of doubtful or bad debts.

I cannot see that the jury were misdirected as to the value or effect of these exhibits.

The Government Advocate's certificate in the case of Clifford. Para. 1

If there was a complete absence of evidence as to the doubtfulness or badness of the various debts it would have been necessary to instruct the jury to that effect. But this was not the case. I reminded them of the principal facts appearing in evidence with regard to each of the debts leaving it to them to decide as to the sufficiency of the evidence. I do not think that this method of dealing with the matter was incorrect. The learned Officiating Chief Judge has given a summary of the evidence relating to the debts and has mentioned several points which were not specifically noticed in the summing up. It is unnecessary for me to go over the same ground. But as regards Mower & Co.'s debt, it is desirable to refer to Exs. 92 (a) and QQI which are now relied upon as showing that Mower & Co., had a large margin of

security which could have been made available for their debt to the Bank of Burma. Ex. 92 (a) was put in by the prosecution and it was never contended by the defence that the securities shown in that exhibit as lodged with the Bank of Bengal and Perchiappa Chetty were more than sufficient to cover the liability of Mower & Co. to those creditors. Towards the close of the case, QQ and QQI were put in by the defence, but only for the purpose of showing that Clifford has disclosed the position of affairs unreservedly to the Bank of Bengal when he went to Calcutta in November 1911, to ask for assistance from that Bank. It was not suggested at any time during the trial that these securities would yield a surplus so that Mower & Co., could have given a second or third lien on them to the Bank of Burma. The values of the immovable property mentioned in the exhibits was not examined and the terms of the first and second liens to which the securities were already subject were not disclosed. Exs. 92 (a) and QQI went to the jury without any allegation on the part of the defence that they bore upon the question of the goodness or badness of Mower & Co.'s balance due to the Bank of Burma. They have been referred to now, merely as showing that the defence were misled into thinking that the goodness or badness of Mower and Company's debt was not in issue. But, as I have already said, I think there is no foundation for this complaint. As the defence did not rely upon Exs. 92 (a) and QQI for the purpose of proving Mower and Company's balance to be good, I think it must be inferred that this method of proving it would not have been successful.

With regard to the Aung Ban and Refinery Companies' debts I wish only to say that the process which a creditor would have to follow in order to recover the shares distributed by the liquidators was not fully investigated at the trial. It was, no doubt, incorrect to suggest that the creditor could only follow up the shares in the hands of the persons now holding them. The matter has now been threshed out and the conclusion arrived at is stated in the order of the learned Officiating Chief Judge. It shows, I think, that I was right in instructing the jury that the Bank had had very little prospect of recovering any substantial part of the distributed shares.

Certificate of Clifford Para. 2.

Mr. Meugens said that if the unearned interest on a debt is credited to deferred interest it does not follow that the principal should be reserved against as a doubtful debt, and this remark was not repeated by me to the jury. He explained this remark by saying that the security might be sufficient to cover the principal but not the interest. Later on, when telling Mr. Giles what he thought of Allen's letter of 1st August, he remarked, of his own accord, that crediting interest on unsecured loans to interest suspense presupposes that the unsecured loans are doubtful. We probably assumed that the debtors referred to in Allen's letter had furnished all the security they possessed as indeed appears to have been really the case: see Ex. 6. If the debtors were people of undoubted financial capacity apart from the security they had furnished, Allen would not have made this recommendation at all.

In the circumstances I do not think that there was any inconsistency between Mr. Meugen's first remark and his second remark which was made with special reference to the circumstances of this case as indicated by Allen's letter. I cannot admit, therefore, that there was any misdirection in what I said to the jury as to Mr. Meugen's opinion about interest suspense.

Presumptions on p. 10 *of summing up.*

As regards Attia, Hartnoll, J., has indicated the main grounds for thinking that this debtor of the Bank was closely connected with Mower and Company even after he ceased to be a partner in the firm. Looking to all the circumstances appearing in evidence on this point and especially to the fact that Mower and Company were guaranteeing Attia's debt to the extent of 1 and 1/2 lakhs, I think it is a reasonable inference that the Directors and Manager would follow his affairs closely.

Page 15.—The Director, Clifford, certainly knew in July that practically the whole of the claim against the British Burma Petroleum Company was disputed. The Bank would bring serious pressure to bear on the British Burma Petroleum

Company by suing on the liquidators' claim for £ 70,000 or by threatening such a suit. The effect of such a suit at that time would be highly detrimental if not ruinous to the British Burma Petroleum Company. I think this is clear from Mr. Williamson's evidence and from the terms of the trust deed. As a Director of the British Burma Petroleum Company and as a partner in Mower and Company, the Managing Agent, the accused Clifford, could hardly be ignorant of the factors governing the situation.

Page 20.—I stated the inference which appeared to me to be deducible from the facts as to Mower and Clifford's strong motive for keeping the Bank afloat. The inference was justifiable in my opinion, but it was left to the jury to form their own conclusion.

Page 24.—The use of the word "opportunities" in this passage was, no doubt, unsuitable. But I do not think the jury could have been misled by it. The meaning of the whole passage from which this is abstracted was plainly that the jury should decide whether. Mower and Clifford had actual knowledge of the state of the debt and securities, and the jury's decision was to be based on the evidence before them showing the close connexion of the two Directors with the affairs of the debtor Companies (Aung Ban, Refinery, and Mount Pima) and with Attia and Cotterell.

As regards the second extract from p. 24, I can see no valid ground for objection. It was admittedly a time when Mower and Company's financial resources were strained to the utmost and when the shares in the Mower Companies which formed the bulk of the securities held by the Bank had much depreciated. Moreover, the Director Clifford's attention had been drawn specially to the critical condition of the Bank's affairs by the Auditor's advice not to pay a dividend. In these circumstances, I think the presumption was justifiable that Clifford, who was the only Director in Rangoon, was cognizant of the principal factors by which the profit of Rs. 1,62,000 was arrived at, and this presumption is borne out by the report of his own speech to the shareholders on 16th December: p. 46 of the Minute Book, Ex. 4.

Strachan's certificate paras. 1, 2 and 3, *p.* 10 *of summing up.*

The grounds statd in paras. 1 and 2 have already been discussed in my remarks on Clifford's certificate. As regards the passage on p. 10 of the summing up it seems to me that there is nothing unreasonable in presuming that Bank Managers are conversant with the financial affairs of borrowers. It is a principal part of their business to keep themselves acquainted with the vicissitudes of fortune that befall the clients of the Bank. Of course Bank Managers sometimes neglect this part of their business and if a Bank Manager lost touch with a borrower through mere negligence he might go on honestly reckoning the debt a good debt after it had become doubtful. But I do not think there was anything wrong in reminding the jury of the general course of business in this matter. They were in a position to judge for themselves whether the accused Strachan belonged to the class of merely negligent managers.

Page 15.—I see nothing wrong in this passage. Strachan admitted that he discussed the question of the disputed claim with Clifford, and has never alleged that Clifford misled him as to the nature and extent of the dispute. This being so it was left to the jury to draw their own conclusion as to what Strachan was told by Clifford.

Page 17.—The inference suggested in this passage as to Stephen and Son's estate appears to be correct. As to the admissibility of the witness Sen's evidence about the solvency of the estate at various periods, I have nothing to add to what has been said by the learned Officiating Chief Judge.

Page 26.—The passage objected to on this page is little more than a repetition of what was said on p. 10 and I have already referred to that.

Mower's certificate, para. 1.

The learned Officiating Chief Judge has referred to the evidence indicating that the unsecured balance of Mower and Company's debt was doubtful to the knowledge of the accused and I have nothing to add to the remarks I made on this point in dealing with para. 1 of Clifford's certificate.

I have already dealt with para. 2 of Mower's certificate. It is the same as para. 2 of Clifford's certificate.

Paragraph 3.—In para. 3 it is stated that I misdirected the jury in stating to them that the Auditor is not there for the Directors and Manager to lean upon and in not directing them that the decision in *Dovey* v. *Cory* (1) governed the matter.

My remarks as to the functions of an auditor are in a part (p. 21), of the summing up entirely distinct from my remarks on the *Dovey* v. *Cory* case (1). p. 25. In dealing with auditors I pointed out that their principal duty is to protect the shareholders, to see that the Directors and Manager are issuing true balance sheets. In that connexion, the statement that the auditor is not there for the Director and Manager to lean upon seems to be appropriate. The jury would understand that I was merely emphasizing the principle that it is the shareholders who are entitled to rely on the auditor as a check on the Directors. The remark would have required qualification if I had used it in commenting on *Dovey* v. *Cory* (1). In a later part of the charge to the jury, I pointed out to them the differences between the facts of that case and this but did not call attention to the ruling of the House of Lords which was to the effect that the Director, Cory, was not bound to go into detail himself and was not to blame for acting on the assurances of his co-Director and Manager that all was as it should be. It seems to me that the present case is sharply distinguished from *Dovey* v. *Cory* (1) by the evidence, direct and indirect, of knowledge on the part of the accused Mower and Clifford who were not only Directors af the Bank but themselves constituted the firm of Mower and Company which with its connected companies and firms absorbed by far the greater part of the funds of the Bank, and who apparently instituted the Bank with the main object of financing these various enterprises. Having regard to Mower's arrival from England on the very day on which he signed the balance sheet, it might have been better to remind the jury expressly that Mower if he had no reason for suspicion, was entitled to accept the figures as set before him by the Manager and Auditor. But I do not consider that the omission amounted to a misdirection in the circumstances.

Paragraph 4.—The learned Officiating Chief Judge has dealt with the presumptions or inferences extracted in this paragraph and I concur in his remarks. In each case I merely stated to the jury my own opinion as to the inferences that might be drawn from the facts appearing in evidence. I think the inferences were reasonable but in any case the jury were left free to form their own opinion on the facts.

Sentences.—As to the sentences I agree with my learned colleagues. The money was taken from the three depositors each on a different date and as I have already pointed out, the dishonest intention which is the gist of the offence in each case is not merely the dishonest intention when the balance sheet was issued but the dishonest intention at the time when the offence was completed by the acceptance of the deposit. I cannot see therefore how the three offences can be regarded merely as parts of one composite offence under the first part of S. 71, I. P. C.

I concur therefore in thinking that the three applications should be dismissed.

K.N./R.K. *Applications dismissed.*

A. I. R. 1914 Lower Burma 128

Full Bench

HARTNOLL, OFFG. C. J., AND TWOMEY, PARLETT, YOUNG, ROBINSON AND ORMOND, JJ.

Ti Ya and *others*—Accused.

v.

Emperor—Opposite Party.

Criminal Ref. No. 80 of 1913, Decided on 2nd January 1914.

Criminal P. C. (5 of 1898), S. 103—Wardheadmen held to be competent search witnesses—(Per *Young, J.*)—**Word "respectable" cannot be construed to mean unconnected with police—Burma Gambling Act (1899), S. 7.**

Per *Parlett, Young* and *Ormond, JJ.*, Wardheadmen in towns other than Rangoon are competent witnesses of searches under S. 103—(*Hartnoll, Offg. C. J.* and *Robinson, J.*, dissenting). [P 130 C 2]

Per *Young, J.*—It is beyond the province of the judiciary to construe the word "respectable" in S. 103, as meaning "respectable and independent or unconnected with the police.": 4 *L. B. R.* 213, (*F. B.*); 8 *Cr. L. J.* 413; 10 *I. C.* 796 (*English cases referred.*) [P 133 C 1]

Eggar—for the Crown.

Order of Reference

Twomey, J.—The ruling *Ah Shee* (*Ah Tu[illegible] v. Emperor* (1) was followed by a ma[illegible]y of the Full Bench in *Emperor* v. *Kwe Htaw* (2). But both these cases related to ward-headmen in Rangoon only (where the head-men are appointed by the Commissioner of Police) and not to ward-headmen in other towns (where the Deputy Commissioner is the appointing authority). The question whether the ward-headmen in towns other than Rangoon are competent witnesses of searches under S. 103, Criminal P. C., was specifically raised in a later unreported case, *Emperor* v. *Kan Haw* (3), (*Criminal Appeal by the Local Government No.* 252 *of* 1910), and was considered by a Full Bench of this Court. The case was decided partly on other grounds. The Bench consisted of four Judges and they were equally divided on the question whether the ward-headmen outside Rangoon could be regarded as competent witnesses of searches.

It is desirable that the existing uncertainty on this point should be ended and, I think, it should again be referred to a Full Bench. I therefore refer it under S. 11, Lower Burma Courts Act.

The gambling in this case appears to have been on a petty scale and the fines are, I think, excessive for a first offence. The expediency of reducing the fines will be considered (if necessary) when the decision of the Full Bench is received.

Opinions

Parlett, J.—The question referred has arisen, as it arose in all the reported decisions which have been quoted, in a gambling case in consequence of the strong presumption which S. 7, Burma Gambling Act, 1899, compels to be drawn. That Act permits, on the receipt of certain information, a search warrant to be issued to a police officer of a prescribed standing; it directs the search to be made in accordance with the provisions of S. 103, Criminal P. C., and if at that search instruments of gaming are found, it compels the Court to presume until the contrary is proved that the house or place searched is used as a common gaming house and that the persons found therein are guilty of an offence under S. 11 of the Act. It is noticeable that the law against common gaming houses in other provinces is less stringently worded than in the Burma Gambling Act; for instance, the Calcutta Police Act (Bengal Act 4 of 1866), the Bengal Public Gambling Act (Bengal Act 2 of 1867), the Bombay Prevention of Gambling Act (Bombay Act 4 of 1887) and the Madras City Police Act (Madras Act 3 of 1888) use wording similar to that of the Public Gambling Act (Act 3 of 1867), namely, that the finding of cards, etc., at the search should be evidence, until the contrary is made to appear, that the place is used as a common gaming house and that the persons found therein were present for the purpose of gaming. None of them provides that the searches should be made in accordance with S. 103, Criminal P. C., and it was not until Bengal Act, 3 of 1910, was passed that the Calcutta Police Act was amended in this sense.

It is therefore not surprising that the question should apparently have never arisen in other provinces. Even if persons are there appointed to positions analogous to that of ward-headmen in Burma, such headmen are appointed as being respectable inhabitants of the locality, and I think very strong and clear reasons are needed for holding that they do not fall into the category of persons competent to witness searches. I doubt if it would have occurred to anyone to question their competency had it not been for the presumption created by S. 7, Burma Gambling Act. Though at first sight that presumption taken by itself might appear almost a violent one, the reason for it becomes clearer on a consideration of local habits and conditions, of the object of the Act and of its earlier provisions. When enacting the conditions under which the presumption should arise the legislature had before them these considerations and they deliberately added compliance with S. 103, Criminal P. C., in respect to the search as one of those conditions. They also had before them the duties imposed on ward-headmen by the Lower Burma Towns Act, 1892, which for the purposes of this case may be taken to be identical with those imposed by the Burma Towns Act, 1907. It would

(1) [1905-1906] 3 L. B. R. 229=12 Bur. L. R. 248=4 Cr. L. J. 390.
(2) [1907-1908] 4 L. B. R. 213=14 Bur. L. R. 81=7 Cr. L. J. 479.
(3) [1911] 10 I. C. 796=4 Bur. L. T. 91=12 Cr. L. J. 251.

have been easy to make the provisions as to the search still more stringent had that been their intention, and unless such intention is clearly indicated or must necessarily be implied, I think the Court would be going on beyond its province of interpreting in introducing further restrictions. Still more do I think that this would be the case when the result of such restrictions is not merely to require the fulfilment of further conditions before the presumption under the Burma Gambling Act can arise, but to add very important qualifications to the provisions of S. 103, Criminal P. C., applicable to all searches under the Code, for which I think there is no sufficient warrant in any part of that Code.

The duties of a ward-headman, though principally of other natures, include that of taking measures for the prevention and detection of certain forms of crime in his ward, but his duties are limited to heinous offences and it cannot be supposed that the Local Government would sanction their extension to any but serious crimes. In this respect his obligations are even less than those imposed on every owner or occupier of land by S. 45, I. P. C., yet the legislature did not declare these obligations to disqualify such persons from witnessing searches under S. 103. If a ward-headman becomes disqualified because of his obligations under certain circumstances to assist the police, any inhabitant of his ward whom he requires to assist him might be held equally disqualified as being his assistant, and in the event of a general requisition it might become almost impossible to conduct a search in the ward at all. There are no means of compelling any private person to witness a search and if the police are not allowed to utilize the services of men whose duty it is to assist them and who from their status are most likely to act honestly and straightforwardly, they might be tempted to fall back upon persons who are ready to do their bidding; and I think it may fairly be said that at any rate that was not the intention of the legislature. A rule excluding ward-headmen in towns from witnessing searches would, I think, have to be extended logically to headmen in villages; the necessity or the desirability of so doing has, so far as I know, never been suggested and I would note that ward-headmen appear to be less directly under the control of the executive authorities than are village headmen.

In my opinion the Criminal Procedure Code contains nothing from which it can be inferred that the legislature intended to exclude persons in the position of ward-headmen from the category of respectable inhabitants for the purposes of S. 103, and that the subsequent enactment of the provisions of the Burma Gambling Act regarding the presumption which arises in certain circumstances after such a search does not warrant the Court in so interpreting the language of the Criminal Procedure Code as in reality to modify its provisions. In my opinion a person who is appointed to be a ward-headman in a town other than in Rangoon is not merely by reason of such appointment incompetent to witness a search under S. 103, Criminal P. C.

Young, J.— The question referred to is whether ward-headmen outside Rangoon can be regarded as competent witnesses of searches under S. 103, Criminal P. C. The question was raised in a gambling case and is of peculiar importance in cases of this nature, inasmuch as the Gambling Act raises certain presumptions against the accused if the search is properly conducted. The arguments before us were also directed towards the provisions of this Act and I therefore propose to deal mainly with searches made under this Act. S. 6, Gambling Act, provides that all searches shall be made in accordance with the provisions of S. 103, Criminal P. C., and S. 7, Gambling Act, provides that when any instruments of gaming are found in any house, etc., entered under the provisions of S. 6 or about the person of any of those who are found therein, it shall be presumed until the contrary is proved that such house, etc., is sued as common gaming house and that the persons found therein were then present for the purpose of gaming although no play was actually seen. S. 103, Criminal P. C., provides that the search shall be made in the presence of two or more respectable inhabitants of the locality. In the Full Bench case of *Emperor* v. *Kwe Haw* (2), heard before Sir C. Fox, C. J., Irwin, J., and Hartnoll, J., it was held by Fox, C. J., and Hartnoll, J., Irwin, J., dissenting, that ward-headmen in Rangoon being appointed by the

Commissioner of Police and having certain police duties to perform did not fall within the class of persons whom the legislature intended to be called as witnesses to searches under this section. In *Paw Ya* v. *King-Emperor* (4), Twomey, J. C., declined to follow this ruling so far as Upper Burma was concerned, and in the Full Bench of *Emperor* v. *Kan Haw* (3), as Judge of this Court, dissented in conjunction with Ormond, J., from Sir Charles Fox, C. J., and Hartnoll, J., who held that the principle enunciated in *Emperor* v. *Kwe Haw* (2) should be extended so as to exclude all ward-headmen and block elders throughout Lower Burma from the category of competent witnesses of these searches.

The appeal however was ultimately decided on other grounds. The question however has now been referred by the same learned Judge to a Full Bench of this Court for final decision. We see therefore that out of the three Judges who have had actual experience of the working of this provision of the law on the executive side, one Irwin, J., declined to hold that a ward-headman even in Rangoon was not till the contrary was proved a respectable inhabitant within the meaning of S. 103, Criminal P. C., and expressed the opinion that to extend the exclusion to village headmen would be not only absurd but detrimental to village administration. He declined on the ground that the case was not before him to consider whether the presumption would be forfeited if the police officer conducting the search called in two fellow-policemen to witness it, a point on which Sir Charles Fox had relied as showing that at any rate some limitation must be placed on the term "respectable inhabitant." Twomey, J., while agreeing with Sir Charles Fox that the employment of two policemen as witnesses would forfeit the presumption and therefore agreeing that the Court was competent to interpret the wide expression "respectable inhabitant," also agreed in *Emperor* v. *Kan Haw* (3) with Irwin, J., that the ruling in *Emperor* v. *Kwa Haw* (2) unduly restricted the meaning of the words "respectable inhabitants," though he did not go so far as to characterize the proposition as absurd and detrimental. There is therefore a majority of learned Judges with actual experience of ward-headmen in favour of retaining them. This may be an accident, but when we find it laid down by Lord Mersey in *Thompson* v. *Goold* (5) that "it is a strong thing to read into an Act of Parliament words which are not there and in the absence of clear necessity it is a wrong thing to do," it is an element that has to be considered by the Court. In one of the two cases cited by Sir Charles Fox on this point, namely, that of *Curtis* v. *Stovin* (6), the necessity was contained within the four corners of the Act and was clear. S. 65, County Courts Act 1888, had provided that "where in any action of contract brought in the High Court the claim indorsed in the writ does not exceed one hundred pounds it shall be lawful for either party . . . . . to apply to a Judge of the High Court at Chambers to order such action to be tried in any Court in which the action might have been commenced." But as the jurisdiction of the County Courts was limited to claims notexceeding £ 50 it followed that the action could not have been commenced in any County Court and the Judges therefore read into the section the words " if the amount claimed had been such that it could have been commenced in a County Court." Here it is admitted that it is impossible to predicate of the class in question that it is not prima facie respectable, but it is contended that the legislature must have meant as an additional qualification that the witnesses must not only be respectable but unconnected with the police.

This may or may not be an improvement on the law as it stands, but I am unable to hold that it is an addition necessary in the sense laid down in *Curtis* v, *Stovin* (6), *ut res magis valeat quam pereat.* Nor do I understand that the learned Judges who are in favour of the proposed construction would go so far as to say the addition was necessary in the above sense. Sir Charles Fox in *Emperor* v. *Kwe Haw* (2) argued that some limitation was necessary so as to exclude

(4) [1908] U. B. R. 2nd Quarter, Gambling, p. 1=8 Cr. L. J. 413.

(5) [1910] A. C. 409 = 79 L. J. K. B. 905=103 L. 81=54 S. J. 599=26 T. L. R. 526.

(6) [1889] 22 Q.B.D. 513=58 L. J. Q. B. 174=60 L. T. 772=37 W. R. 315.

one policeman calling two others and that therefore it was permissible and desirable to carry out the intentions of the legislature to their fullest extent. Hartnoil, J., in *Emperor* v. *Kan Hwa* (3), repeated the argument and added that it was desirable that one general rule should be laid down for all ward-headmen and block-elders. These arguments seem to me to imply that while it was in the opinion of these learned Judges absolutely necessary to exclude policemen in the sense of *Curtis* v. *Stovin* (6) it was only a desirable improvement to exclude all ward-headmen. *Curtis* v. *Stovin* (6), therefore does not seem to me to be an authority that will support the proposed alteration, the object of which is not to preserve but merely to improve the Act. Again if the proposed change is merely an improvement, there is clear authority that it does not lie in the province of the judiciary to alter a statute for such a purpose. "The business of the interpreter is not to improve the statute; it is to expound it. The question for him is not what the legislature meant but what its language means; what it has said it meant:" Cockburn, C. J., in *Palmer* v. *Thatcher* (7) and Lord Coleridge in *Coxhead* v. *Mullis* (8). Sir Charles Fox however also relied upon *Rex* v. *Hall* (9) which brings into play another line of authorities dealing with the interpretation of general words, and the ordinary sense of which is sometimes restricted and sometimes enlarged in order to effectuate the intention of the legislature.

Thus in the case cited by him which was a voting case dependent on the meaning of the term house-holder, the word was construed so as to include the merchants trading in partnership and possessing a house, the property of the partnership. Abbot, C. J., held that "the object of the statute appeared to have been to unite respectability of character in the place with a habit of access and resort to that place and that it would be obvious that an exclusion of persons in the situation of gentlemen to whose votes exception was taken would be an exclusion in this and many other cases of a very large portion of those who were best qualified for the discharge of the particular duty that might be the subject of inquiry." The judgment is interesting as the learned Chief Justice expressly instanced the term "inhabitants" as one of those general words which was construed according to the object of the statute in which it occurs, and it appears from Maxwell on Statutes that where the statute imposes a duty on the inhabitants of a certain place it construes the terms in its popular sense, but when it imposes a pecuniary burden it excludes persons who though inhabitants have no rateable property and includes persons who though not inhabitants yet hold rateable property there.

Now the imperial legislature in S. 103, Criminal P. C., uses this very term "inhabitant," but limits it by adding a qualification, viz., that the inhabitants are to be respectable, and the provincial legislature in incorporating the provisions of this section into S. 6, Gambling Act, have added a further qualification by enacting that the Police Officer conducting the search shall not be below the rank of a sergeant or officer-in-charge of a Police Station. This further qualification is obviously introduced by the local legislature with a view to free searches under the Gambling Act, which raises the presumption already mentioned, from suspicion.

The qualification "respectable" must have been considered and found insufficient, but instead of limiting it in the manner now proposed, the local legislature preferred to impose a qualification upon the person employed to conduct the search. It is he and he only who may make the search, and the duties of the "respectable inhabitants" are confined to looking on while he searches. There is nothing in the section that entitles them so far as I can see to lend the officer in charge any assistance whatsoever in making the search and I conceive that objection might properly be taken to any such assistance being given whether by actually participating in pointing out omissions in the search. It is he and he alone who is authorized by the warrant to make the search, and they are to attend and witness it. The sole exception (and that is the subject of a special

(7) [1876] 3 Q. B. D. 346=47 L. J. M. C. 54=37 L. T. 784=26 W. R. 314.
(8) [1879] 3 C. P. D. 439=47 L. J. C. P. 761=39 L. T. 349=27 W. R. 136.
(9) 1 B. & C. 123=25 R.R. 321=107 E. R. 47=2 Dowl. & Ry. 241=1 L. J. K. B. (o. s.) 20.

provision) is that if a person is to be searched and that person is a woman, the search shall be conducted by one of her own sex. May it not therefore be reasonably held that the legislature considered that it had gone far enough by confining the right of search to a superior Officer of Police such as a sergeant or the officer in charge of the local Police Station? Brett, J., in *Lion Mutual Marine Insurance Association* v. *Tucker* (10), a much later case then *Rex* v. *Hall* (9), stated that whenever a statute is to be construed it must be construed not according to the mere ordinary general meaning of the words, but according to the ordinary meaning of the words as applied to the subject-matter with regard to which they are used, unless there is something which renders it necessary to read them in a sense which is not their ordinary sense in the English language as so applied. To construe the term "respectable," as meaning "respectable and independent" would be to import a wholly different qualification totally alien to this ordinary sense of the term, for it is obvious that a man may be respectable though connected with the police, and I cannot see any necessity, to use the words of Brett, J., has been shown for the proposed construction. To add the additional qualification that the witness must be not only respectable but unconnected with the police may or may not be an improvement on the Act. From some points of view it obviously might or even would be so, but it is the business of the judiciary to declare and interpret, not to improve the law.

It is for the legislature to consider how to improve the law and in doing so it considers not only the claims of the subject, but the good of the realm, and has in mind considerations that cannot, or cannot conveniently, be discussed in a Court of law. While therefore though I can conceive that the proposed construction might be for the good of the subject it is not clear to me, especially in the face of its unmeasured condemnation by a Judge of the experience of Irwin, J., that the change would be for the good of the province as a whole. In my opinion therefore to impose the proposed construction on the Gambling Act is an intrusion on the domain of a legislature and one which circumstances do not seem to me to warrant. In cases other than those concerned with gambling no such presumption is raised and a Police Officer calls such witnesses at his own risk, and it is a question for the Court in each case to decide whether the search is reliable even though the witnesses may not be shown to be other than respectable. If they are not so, the search is not made in accordance with S. 103, but even if they are, no such presumption as arises under the Gambling Act arises by force of the ordinary law. In these cases also therefore I would leave it to the legislature to determine whether the safeguards provided are sufficient, and refrain from altering under the guise of construing the law. My answer therefore to the question referred is in the affirmative.

Robinson, J.—It has been held by a majority of a Full Bench of this Court that ward-headmen in Rangoon, who are appointed by the Commissioner of Police, are not competent witnesses. The only distinction between the two seems to be that one class are appointed by Deputy Commissioners while the other are appointed by the Commissioner of Police, and that the former are not quite so closely in contact with the police as the latter. If the words "respectable inhabitants of the locality" are to be taken in their widest sense, then all these persons would presumably be prima facie competent witnesses. It is however generally agreed that if the witnesses selected were policemen living in the locality the requirements of the Code would not be satisfied and that not because the particular policemen were not respectable, but because the legislature intended the witnesses to watch the search and to see that it was fairly and properly conducted, which requirement would not be satisfied by a policeman watching a policeman. I think there can be no question that this is the right view, but if this is so, the words are not to be interpreted in their widest sense. In order to arrive at a decision as to how far their ordinary meaning is to be limited, I think it is necessary to endeavour to find out the object and intentions the legislature had in view in framing the section. I agree with and have

(10) [1884] 53 L. J. Q. B. 185=12 Q. B. D. 176=49 L. T. 764=32 W. R. 546.

nothing to add to the remarks of Sir Charles Fox in *Emperor* v. *Kwe Haw* (2) as the rule of interpretation that should be followed in this case. We have to regard not so much the ordinary and popular meaning of the word "respectable" but the subject and occasion on which it is used in the section and the object which is intended to be attained.

In S. 103, the object, I think, was to provide a safeguard against false charges, a check on the officer or other person making the search, and guarantee that the search was properly and fairly conducted. The object in requiring two or more respectable persons was that the person searched or the owner or occupier of the premises searched might have some one to whom he could point out any wrong done and whom he could call as witnesses if necessary. They must be persons who would be impartial and on whom prima facie he could rely. They were to be inhabitants of the locality for the same reasons. It was not merely to the Government and the officers administering justice that they are to afford guarantee of fair dealing and the absence of chicanery, but also to the person immediately affected. This is, in my opinion, a very important point in arriving at a decision. The officers appointing ward-headmen and others of a like status must be presumed to have made the appointments in the belief that those selected were honest and respectable men. But if their duties are connected with the police, if they looked for credit or reward from work done in conjunction with the police, would they satisfy the requirements of the object the legislature had in view? I think not. It is only by giving the words their widest and most popular significance that it can be held that they are such persons as the legislature had in view. That, in my opinion, was not intended and that view would not fulfil the intention of the legislature and would stultify the reasons that led to the enactment of the provision. For the above reasons they are not, in my opinion, competent witnesses.

Ormond, J.—For the reasons stated by me in my judgment in *Emperor* v. *Kan Haw* (3) I hold that ward-headmen are competent witnesses to a search under S. 103, Criminal P. C. There is no necessary implication that the witnesses (not being policemen) should be persons who are free from any obligation of assisting in any way the police in the prevention and discovery of crime, or that they should be persons who do not hold office under Government. I would answer the question referred in the affirmative.

Hartnoll, Offg. C. J.—I have further considered the matter and can see no good reason for changing the views expressed by me in the case of *Emperor* v. *Kan Haw* (3). I would therefore answer the question referred in the negative.

Three Judges having answered the question in the affirmative and two in the negative, the opinion of the majority will prevail as the opinion of the Full Bench.

K.N./R.K. *Reference answered.*

A. I. R. 1914 Lower Burma 134

TWOMEY, J.

Ba Nyun and *others*—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 101 of 1913, Decided on 3rd July 1913.

Penal Code, S. 188—Land granted to *A*—*B* building on that land—Disobedience by *B* of order promulgated by Deputy Commissioner.—*B* is not guilty under S. 188.

An order directing persons other than the grantee of certain land to take certain order with buildings thereon is not authorized by the Burma Land and Revenue Act, or the rules thereunder.

Therefore, where land was granted to *A*, but was built on by *B*, the failure of *B*. to remove the building in obedience to an order promulgated by the Deputy Commissioner would not render him liable under S. 188, I. P. C. [P 135 C 1]

Maung Pu—for Applicants.

Judgment.—The applicants lately built zayats on a piece of land surrounding a certain ancient pagoda in the Insein District. But a grant of the land had already been granted by the Deputy Commissioner in 1909 for the purpose of a Karen Christian burial ground.

The Township Officer, by the Deputy Commissioner's orders, directed the applicants to remove the zayat by a certain date, and as the applicants failed to comply they were prosecuted under S. 188, I. P. C., and fined Rs. 5 each. They have now applied in revision to this Court, pleading inter alia that the Deputy Commissioner and the Township Officer were not lawfully empowered to promulgate the order in question.

It does not appear from the revenue proceedings or from the convicting Magistrate's judgment under what provision of law the Deputy Commissioner conceived himself to be acting. I am unable to find that there was any lawful authority for the order. The Land and Revenue Act and the rules framed under it do not appear to confer on revenue officers any power to deal with third parties who trespass on grant land, or who otherwise interfere with the grantee's enjoyment thereof. So far as I can see, an order directing persons other than the grantee to take certain order with buildings on the land is not authorized by the Act or rules.

Furthermore, it is very doubtful whether the trial of the ten applicants jointly was lawful under Ch. 19, Criminal P. C. The case does not seem to me to fall under S. 239.

Notice of the present application was sent to the District Magistrate but no one has appeared in support of the convictions.

On the above grounds, I set aside the convictions and sentences and direct that the fines paid by the applicants shall be refunded to them.

K.N./R.K. *Convictions set aside.*

A. I. R. 1914 Lower Burma 135 (1)

ORMOND AND PARLETT, JJ.

Mg So and *another*—Appellants.

v.

O. A. R. Ramasawmy Chetty and *others*—Respondents.

First Appeal No. 50 of 1912, Decided on 25th May 1914.

Transfer of Property Act (4 of 1882), S. 59—Attesting witnesses must witness actually execution—Attestation by one witness and scribe is not sufficient.

It is necessary fot the validity of a mortgage deed that the attesting witnesses should be present to attest the actual fact of execution by the executant: 35 *Mad.* 607 (*P. C.*), *Rel. on.*

Therefore a mortgage which is attested by only one witness and is signed by the scribe as writer and not as a witness is invalid.

[P 135 C 2]

May Oung—for Appellants.

Halkar—for Respondents.

Ormond, J.—The appellants are defendants 5 and 6 in the suit.

The plaintiffs sue as the assignees of a mortgage on several lands and the question in this appeal is, whether the appellants are entitled to the benefit of a mortgage, Ex. E. of the 23rd March 1905, by which defendant 4 purported to mortgage the lands in question to the plaintiffs' assignor. The mortgage upon which the plaintiffs sue is dated 1st May 1906 and was assigned to the plaintiffs on 2nd December 1908. On 25th October 1909 the appellants paid off the amount due uuder Ex. E and bought the lands in question from defendant 4 free from mortgage.

It is not disputed that the lands in question are subject to the plaintiffs' mortgage, but the appellants claim that they are entitled to be treated as first mortgagees and to have the benefit of the mortgage Ex. E.

The mortgage, Ex. E, was attested by only one witness. The writer signed his name as writer and not as a witness. Under the authority of the Privy Council case of *Shamu Patter* v. *Abdul Kadir Ravuthen* (1) it is necessary that the attesting witnesses should be present to attest the actual fact of execution by the executant; Ex E therefore was invalid as a mortgage. The plaintiffs' assignor understood it to be inoperative as a mortgage; and on 14th July 1909 he took a properly executed mortgage from defendant 4 for the amount that he had advanced under Ex. E. The appellants therefore are not entitled to a prior claim as mortgagees under Ex. E.

I would dismiss the appeal with costs.

Parlett, J.—I concur.

K.N./R.K. *Appeal dismissed.*

(1) [1912] 35 Mad. 607=39 I. A. 220=16 I. C. 250 (P. C.).

A. I. R. 1914 Lower Burma 135 (2)

PARLETT, J.

Sweydali—Appellant.

v.

Esnali and *others*—Respondents.

Special Second Appeal No. 76 of 1912, Decided on 22nd July 1913.

Transfer of Property Act (4 of 1882), S. 53—Suit for possession of land transferred by plaintiff fraudulently benami—Burden of proof that fraud was not carried out is on plaintiff—Fraud.

The respondents sought to recover some land which they alleged they had transferred benami to the appellant and another by a registered deed in order to defeat the claims of their creditors. The first Court dismissed their suit, but the Divisional Court granted them possession,

without however ordering the cancellation of the sale deed which they also asked for, on the ground that the fraud contemplated was wholly inoperative.

Held : that they were entitled to recover the land under the Privy Council ruling in 35 *Cal.* 551.

Held also : that it lay upon the plaintiffs to prove that no part of the intended fraud had in fact been carried out; that as they were alleging an intended fraud on their part and seeking to escape the consequences of it, they were bound to allege and to prove that the intended fraud was in fact wholly inoperative; and further that unless they alleged and proved that fact their suit must fail. [P 136 C 1]

Billimoria—for Appellant.

Ba Dun—for Respondents.

Judgment.—Respondents sought to recover 24 acres and odd of land which they alleged they had transferred benami to appellant and one Lohman by a registered deed dated 31st December 1908, in order to defeat the claims of their creditors. The first Court dismissed their suit, but the Divisional Court granted them possession, without however ordering the cancellation of the sale deed which they also asked for, on the ground that the fraud contemplated was wholly inoperative. If this be so they are, of course, entitled to recover the land under the Privy Council ruling in *T. P. Pethepermal Chetty* v. *R. Muniandy Servai* (1). The appellant contends that the finding of the Divisional Court was wrong. The first question is upon whom the burden of proof on the point lay, and I have no hesitation in saying that it lay upon the plaintiff to prove that no part whatever of the intended fraud had in fact been carried out. I think this placing of the burden might be referred to Ss. 101 to 103, 106 and 110, Evidence Act, but it will be sufficient to say that the plaintiff is alleging an intended fraud on his own part and seeking to escape the consequences of it, and in order to enable him to do so he is bound to allege and to prove that the intended fraud was in fact wholly inoperative. Unless he alleges and proves that fact his suit must fail and therefore the burden lies on him to prove it.

The evidence he offered was to the following effect : When the transaction was effected on 31st December 1908 he anticipated that three persons would obtain decrees against him, and subsequently they did so, namely, Baungaw for Rs. 500, Chinia Chetty for Rs. 400 and Dagu for Rs. 250 with costs in each case. Plaintiff says he paid off the amount due to each about the time he filed this suit, 24th July 1911. One of his witnesses says he saw plaintiff pay Baungaw Rs. 100, but he admits that Baungaw accepted a smaller sum than was decreed to him. That is all the evidence on the point. Plaintiff admits that Baungaw and Dagu are still in the district, and though he alleged that Chinia Chetty had gone to Madras, there is evidence for the defendant that this is not so, and that he too is in the district. None of them is cited by plaintiff, nor does he produce any record of satisfaction of any of the decrees. On the other hand, the defendants call Chinia, a clerk, who states that his decree was obtained on 26th August 1908, i. e., before the benami sale, and this, together with the admission as to Baungaw's compromise, would be ample to shift the burden to plaintiff even if it originally lay upon defendant to show that the fraud had been carried out. The Divisional Court held that as there had been no attempt by the decree-holders to attach the land and impugn the sale they cannot have suffered, and moreover that as the present suit was being decreed in plaintiff's favour the creditors could thereupon attach the land. As to the first point, it is merely speculation; it may well be that the creditors inquired and believed the sale to be a genuine one, or at any rate that they would be unlikely to be able to prove the contrary. As to the second, as the Divisional Court's decree was only passed on 1st February 1912, it is quite likely that execution of some or all of the decrees might be barred, and admittedly Baungaw had compromised his claim and therefore could not now attempt to execute his decree. In my opinion the testimony as to that compromise alone is strong evidence that in fact the fraud was not inoperative, for it is quite impossible to believe that he would not have got better terms if the land in suit had been available to realize his decree against. The burden which plaintiff took upon himself was, in my opinion, of the heaviest possible nature and he totally failed to discharge or even appreciably lighten it.

I reverse the decree of the Divisional Court and restore that of the Subdivi-

(1) [1908] 35 Cal. 551=35 I. A. 98=12 C. W. N. 562=7 C. L. J. 528 (P.C.).

sional Court ; respondents to pay costs of appellant throughout.

K.N./R.K. *Appeal accepted.*

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* A. I. R. 1914 Lower Burma 137

TWOMEY, J.

Ba Lin—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 38-B of 1913, Decided on 20th June 1913.

*** Railways Act (9 of 1890), S. 101—Actual endangering must be proved — Despatch of train without receiving "line clear"—No accident occurred — Station master held not guilty.**

Section 101 does not provide for cases in which the disobedience of a rule is merely likely or calculated to endanger the safety of any person. In order to sustain a conviction under the section, it must be affirmatively proved that the disobedience of the rules by the railway servant actually and in point of fact endangered the safety of some person. Where a station master despatched a train without obtaining "line clear" from the station ahead, but no accident of any kind occurred nor was the safety of any person actually endangered in any way.

Held : that the station master was not guilty under S. 101, Railways Act : 5 *N. W. P. H. C. R.* 240 and 6 *I. C.* 483, *Rel. on.* ; 4 *L. B. R.* 139 and 4 *L.B. R.* 353, *Dist.* [P 138 C 2]

McDonnell—for Applicant.

Judgment.—The accused Ba Lin, a station master at Gangaw on the Pegu-Martaban railway line, has been convicted under S. 101, Railways Act, of endangering the safety of persons travelling in No. 225 uptrain by disobeying R. 92 of the rules framed under the Act, and he has been sentenced to simple imprisonment for one month. The rule referred to provides that no train shall be allowed to leave a station unless permission to approach has been received from the station ahead. It was found by the Magistrate that Ba Lin neglected to get a "line clear" message from Martaban, the station ahead, and that he nevertheless gave the driver of No. 235 uptrain authority to proceed from Gangaw to Martaban. As a matter of fact, no accident of any kind occurred and apparently the passengers in train No. 235 were not actually endangered in any way. There was no other train on the section between Gangaw and Martaban. When No. 235 approached Martaban, the engine driver found the signals against him. He stopped his engine and whistled. The Martaban Station Master came out on a pilot engine and piloted No. 235 into the station yard.

It was pleaded for the defence that Ba Lin did in fact receive the necessary "line clear" telegram from Martaban and that the Assistant Station Master at Martaban put a false "private number" in the telegram so that he might afterwards be able to deny sending the telegram. It was pointed out that the Assistant Station Master at Martaban was next on the list for promotion to Station Master and that he therefore, had a motive for getting Ba Lin into trouble. The Magistrate disbelieved this defence and I do not think that the Magistrate's finding on the facts should be disturbed in revision. The only question to be decided is whether the conviction was justified on the facts as found by the Magistrate. On this question of law the learned Sessions Judge refers to the cases of *Queen* v. *Munphool* (1) and *Emperor* v. *Ganesh Das* (2). The following is the main part of the judgment in the former case :

"The prisoner has been found guilty of endangering the safety of persons in a certain goods train by negligence ; but although he is shown to have neglected his duty, there is no evidence whatever of the safety of any persons in any goods train having been endangered by his neglect of his duty. On the contrary, it is plainly apparent that, by reason of the precautions taken by other persons, any possible danger which might have resulted from his neglect was avoided. Although therefore he may be punishable departmentally or otherwise for neglect of duty, it does not seem that he can be convicted and punished under S. 29, Act 25 of 1871. It is not a good and sufficient answer to the plea here urged on his behalf to argue that, because a neglect of duty such as he was guilty of, may sometimes lead to the endangering of the safety of persons in a goods train, or that because, had not precautionary measures been taken, and had the line not been clear, his neglect of duty would probably or certainly have endangered the safety of persons in a goods train, he should be held to have actually endangered the safety of persons in a goods train."

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(1) 5 N.W.P.H.C.R. 240.
(2) [1910] 6 I.C. 483.

The latter case of *Emperor* v. *Ganesh Das* (2) contains the following passage :

"It is not sufficient to show that the act of the accused or any omission on his part was likely to endanger the safety of any person. It must be proved affirmatively that it did in point of fact so endanger any person's safety. In the present case, any possibility of an accident was averted by reason of the fact that the special goods train arrived at the Dogra distance signal before the mixed passenger train arrived at that station and therefore it cannot be said that the safety of any person in either trains was actually endangered on the occasion in question. We quite agree that if the facts had been different, if for instance, the mixed passenger train had been started off from Dogra, prior to the arrival of the goods special on the same line of rails, the accused would rightly have been convicted of an offence under S. 101 of the Act, and this, too, though no actual collision had occurred. In that event, his act or omission would unquestionably have resulted in endangering the safety of persons in the two trains."

These rulings strongly support the view of the Sessions Judge that the conviction in the present case cannot be sustained. It is pointed out moreover that the rulings in the Lower Burma Chief Court cases, *Emperor* v. *A. C. Dass* (3), *Emperor* v. *M. N. Atchutaramayya* (4) and *Emperor* v. *Po Gyi* (5), on which the District Magistrate relied, were all cases in which the personal safety of passengers was clearly endangered. In these cases, there was not merely a risk of danger ; the danger actually arose. In the first two cases, the breach of rule resulted in actual collisions and in the third case a collision was narrowly averted. All that the Assistant Traffic Superintendent could say in this case was as follows :

"The breach of the rules by the accused did entail a possibility of accident. For example, if a bridge had been reported insecure or any other obstruction occurred on the section between Martaban and Gangaw and the Station Master, Martaban, had got information just before the train reached Gangaw, the fact of the Station Master, Gangaw, letting the train through without a "line clear" might have caused a serious accident. Or a waggon might have blown out of the yard at Martaban on the single line."

The Martaban Station Master stated that no accident could have taken place in the circumstances. S. 101 does not provide for cases in which the disobedience of a rule is merely likely or calculated to endanger the safety of any person. The intention of the legislature was apparently to leave it to the railway authorities to deal departmentally with disobediences involving risk of danger without entailing actual danger.

On these grounds, I set aside the conviction and sentence and direct that the bail-bond of the accused shall be cancelled.

K.N./R.K. *Conviction set aside.*

(3) [1908] 4 L.B.R. 139.
(4) [1908] 4 L.B.R. 350.
(5) [1908] 4 L.B.R. 353.

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* A. I. R. 1914 Lower Burma 138

ORMOND AND TWOMEY, JJ.

Stuart Smith and *another*— Appellants.

v.

Official Liquidator of Bank of Burma, Ltd.—Respondent.

Civil Misc. Appeal No. 45 of 1914, Decided on 27th May 1914.

*** Companies Act (4 of 1882), S. 214—In proceedings against auditors under S. 214 irregularity of appointment does not avail when they have so acted.**

In a general meeting the share-holders of a company appointed certain persons as auditors who acted as auditors, signed the balance sheet as auditors and were shown as auditors on the front page of the Director's report issued to the share-holders. But it was subsequently discovered that their appointment was irregular inasmuch as the general meeting in which they were appointed was without proper quorum :

Held : in a proceeding against the auditors under S. 214, Companies Act, for misfeasance as auditors, that they were not only de facto auditors but also de jure auditors and that no irregularity in their appointment could avail them : *In re Western Counties Steam Bakeries and Milling Co.*, (1897) 1 *Ch. D.* 617, *Ref.* and *Foll.* [P 139 C 2]

Per *Ormond, J.*—Where three of the Directors who could appoint to a casual vacancy voted as share-holders in the general meeting which appointed the auditors, they could be said to have made the appointment as Directors. (*Twomey, J.*, dissenting.) [P 140 C 1]

DeGlanville—for Appellants.

McDonnell—for Respondent.

Ormond, J.—Proceedings were taken against the appellant under S. 214, Com-

panies Act, for misfeasance as an Auditor of the Bank of Burma. The question in this appeal is whether the appellant was an "officer" of the bank within the meaning of that section. The appellants' firm were appointed by a unanimous resolution to be the auditors of the bank for the ensuing year at the general meeting of the share-holders on 24th June 1911. The appellant signed the balance sheet for the half-year ending June 1911 as the auditor of the bank. Some time later it was discovered that the appointment as auditor was irregular owing to there not having been a properly qualified quorum at the general meeting sufficient for the appointment of an auditor. It is admitted that if there had been a proper quorum the appellant would have been an "official" within the meaning of the section. There is no doubt that he was a de facto auditor of the bank and that he filled that office.

Mr. deGlanville contends that no one could be an "official" of the company unless such person had been properly appointed by the company. The learned Judge on the original side has held that the appellant was a de facto official of the bank and his decision in my opinion, is correct.

In the case of *In re Western Counties Steam Bakeries and Milling Co.* (1) (the case referred to by the learned Judge) it was decided that in that case the auditor was not the Auditor of the Company, but was a servant appointed by one of the Directors to do a certain piece of work, namely, to audit the accounts of the company; but from the judgment in that case it is clear, I think, that the Judges contemplate that an auditor not properly appointed by the company might be a de facto officer of the company and therefore is liable to be proceeded against under S. 10, English Companies (Winding-up) Act, as an officer of the company. Rigby, L. J., pointed out that the Director who appointed the auditors, in that case could have removed them at his pleasure and was not bound to put the result of the audit before the company. But that was not the case here: the appellant was appointed to the office of an auditor of the bank for the ensuing years by share-holders in general meeting who purported to have the power of making the appointment A report of the proceedings of that general meeting was sent to all the share-holders of the bank and every one considered that the appellant's firm had been properly appointed to the office of the auditors of the bank. The share-holders at a properly qualified general meeting could have repudiated the appointment as an appointment made by the share-holders, but that was not done and in consequence the appellant was allowed to remain in the office of auditor. Mr. deGlanville relies upon a dictum of Rigby, L. J., in the above case to the effect that an "officer" can only be removed upon a just cause. But that Judge says he entirely agrees with the judgment of Lindlay, L. J., who says: "If persons are appointed to an office under the company, and if they act in that office as officer of the company, they will be officers within S. 10, and no irregularity in their appointment would, I conceive, avail them."

A Manager or Director who has been irregularly appointed, i. e., a de facto, but not de jure Manager or Director, is within S. 10, English Act. Mr. deGlanville contends that this is so, because a Manager and Director are expressly mentioned in the section. But the company could repudiate the appointment of such a Manager or Director. And a Manager and a Director are both officers of the company; therefore a de facto but not de jure Manager or Director is a de facto but not de jure officer of the company. Moreover though it formed no part of Mr. McDonnell's case for the respondent, in my opinion, the appellant was not only a de facto auditor of the bank but he was also a de jure auditor of the bank and a de jure officer of the bank and was validly appointed as such. Under Art. 111 of the Articles of Association, the person or persons to fill the office of auditor or auditors may from time to time be determined by the bank in a general meeting; the Auditor or Auditors for the time being shall retire at the ordinary general meeting in every year: and if any casual vacancy occurs in the office of auditor the Directors shall forthwith fill up the same. This meeting was the ordinary annual general meeting which had cer-

(1) [1897] 1 Ch. D. 617=66 L. J. Ch. 354=76 L. T. 239=45 W. R. 418.

tain powers, but it required a certain qualified quorum to appoint an auditor. There were four Directors of the Bank of whom one was in England and the other three were at the meeting. The appellant was proposed and seconded by two of these Directors. If the share-holders at that meeting were unable to appoint an auditor owing to the want of a quorum, that would occasion a "casual" vacancy in the office, the casualty being the want of a quorum.

Mr. deGlanville contends that the act of the Directors at this meeting cannot be taken to be an appointment by the Directors, because they did not purport to act as Directors but were acting as share-holders.

It was the duty of the Directors forthwith to fill up the office, and the three of the Directors, so far as they were able, appointed the appellant the Auditor of the Bank at that meeting. No form was necessary for such an appointment by the Directors and the fact that certain share-holders purported also to appoint the auditor would not detract from the power inherent in these three Directors to make the appointment.

I would therefore dismiss the appeal with costs.

Twomey, J.—I do not see how we can treat the appellants as having been appointed by the Directors to a casual vacancy. It is true that three of the Directors voted as share-holders at the meeting which purported to appoint the appellants to the office of auditor. The votes at that meeting were ineffectual because the body of voters was not duly qualified under Art. 55 of the Articles of Association. But my learned colleague suggests that because three of the voters were persons who as Directors could appoint to a casual vacancy, these three persons should be held to have exercised (unknown to themselves) their extraordinary powers of appointment under Art. 111. I cannot agree in this view. The Directors voted only in their capacity as share-holders. They did not intend or purport to exercise their powers as Directors and cannot in my opinion be deemed to have done so unconsciously. Moreover the vacancy was not in my opinion, a casual vacancy. The office was an annual one. The previous holder of the offiee had retired in due course on the expiry of an annual period, and the time had come for refilling the office in the ordinary way. In other words it was an extraordinary and regular, as distinguished from an extraordinary or casual vacancy.

The question we have to settle is whether the appellants, though not regularly appointed to the office of auditor, filled that office de facto and thereby became Officers of the Company for the purpose of S. 214, Companies Act 1882. The English decisions leave no room for doubt that an auditor can be de facto an officer of a company, although hs is not an officer de jure owing to some irregularity in his appointment. There admittedly was such an office in the Bank of Burma Limited, and I think the appellants not only performed the duties pertaining to that office, but did so as holders of the office and not merely as auditors. It is not disputed that the appellants did the work of auditors for the Bank and it is not suggested that there was anything which the person duly appointed to the office of the Auditor of the Bank would have done in this ordinary course that the appellants did not do. But this is not onough. In the words of A. L. Smith, L. J., in the English case of 1897 : *In re Western Counties Steam Bakeries and Milling Co.* (1), "it is no good showing that a person performs auditor's work, it must be shown that he is de facto an officer of the company." The Office of Auditor of a Bank is not one that carries any special insignia. But I think the circumstances show that the appellants actually filled the office. The share-holders in the general meeting purported to appoint them to it in the manner prescribed in the Articles of Association. It was in pursuance of this appointment that they entered upon and carried out the duties of Auditors of the Bank, and no one else was appointed to the post.

On the front page of the Directors' report issued to the share holders the appellants are shown as the Auditors of the Bank. It is not as if the report and balance sheet merely showed that the accounts had been audited by Messrs. Stuart Smith & Allan and found correct. The case is distinguished from that of the firm of auditors in the English case cited above, for the latter were only called in by the Directors to do a particular piece of work, were never des-

cribed as the Auditors of the Company and their services could have been dispensed with at any moment by the Directors without reference to the shareholders. It was never contemplated that Messrs. Stuart Smith & Allan could cease to be the Auditors of the Bank except in accordance with the terms of Art. 111 of the Articles of Association which provides for the vacating of the office. They had the full status of Auditors of the Bank and I think it has been rightly held that they filled that office de facto.

On these grounds I concur in dismissing the appeal.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Lower Burma 141

ROBINSON, J.

Saw Lan—Plaintiff—Appellant.

v.

Maung Lun and *others*—Defendants—Respondents.

Second Appeal No. 218 of 1912, Decided on 23rd January 1914.

(a) Civil P. C. (5 of 1908), O. 32, R. 15—Omission to appoint guardian.

The mere omission to appoint a guardian ad litem for a man of unsound mind does not make the whole suit void ab initio.

[P 141 C 2]

(b) Civil P. C., S. 11—For plea of res judicata person must be properly represented.

To maintain the plea of res judicata it must appear that the person whose interest it is sought to bind or his predecessor-in-title was properly represented: 28 *All.* 1 (*P.C.*), *Foll.* [P 141 C 2]

(c) Transfer of Property Act, S. 41—Applicability.

Section 41 does not apply where the neighbour who knew about the infirmity of the transferor's title omits to make necessary inquiry.

[P 142 C 1]

Villa—for Appellant.

May Oung—for Respondent 3.

Judgment.—Plaintiff-appellant obtained a mortgage of certain property from defendants 1 and 2. It was executed on 10th May 1910. Defendants 1 and 2 became owners of the property by virtue of a deed of gift from defendant 2's father who is defendant 3. This deed was executed on 27th October 1908. The property, the subject of the gift, was the joint property of Maung Pyu, defendant 3 and his deceased wife. The deed deprived another daughter Ma Sah of her share. It was apparently executed in secret and registered at Moulmein. On 1st June 1910, Ma Sah brought a suit against defendants 1, 2 and 3 in this suit to have it declared that her father Maung Pyu at the time of the deed of gift was of unsound mind and that he made the gift under the undue influence of defendants 1 and 2. The Court found that he was of unsound mind at the time of the trial and that the gift was due to undue influence. The deed was therefore set aside. But the Court did not insist on a guardian ad litem being appointed nor did the appellate Court notice the defect.

In the present case the Courts have held that the question of Maung Pyu's unsoundness of mind and the undue influence are matters of res judicata and that it is not open to appellant to reopen these questions. Appellant claims that as no guardian ad litem was appointed for Maung Pyu the whole suit was void ab initio and is therefore not binding on appellant even if he holds under defendants 1 and 2. That he holds under defendants 1 and 2 is clear and if they could not raise the question again he would not be able to do so. Maung Pyu could however raise the question as the appellant does, as has been held by the Privy Council in the case of *Chaudhri Ahmed Bakhsh* v. *Seth Raghubar Dayal* (1), because he was not properly represented in that suit. No authority however has been quoted to me that the whole suit must, therefore, be treated as void. Maung Pyu's presence in the suit did not affect the proper decision of it so far as Ma Sah and defendant 2 were concerned. It appears to have been fully contested by them and an appeal was also filed and I must hold the decision stands good and that defendants 1 and 2 could not raise the question anew. Appellant also, therefore is bound by the decision. The deed of gift is, therefore, invalid and that both as to the half share over which Maung Pyu would have had a disposing power and that in which he had only a life-interest. Maung Pyu did not mortgage to appellant. It is next urged that defendants 1 and 2 could mortgage defendant 2's interest in the property to which she would succeed after Maung Pyu's death.

(1) [1906] 28 All. 1=32 I. A. 229=9 O. C. 7=2 A. L. J. 813=7 Bom. L. R. 912=2 C. L. J. 413=10 C. W. N. 115=15 M.L.J. 407 (P.C.).

No authority was cited for this, and as Maung Pyu might have sold the half in which he had a life-interest for necessity and as he is still alive I cannot admit the plea.

Then it is urged that appellant took a mortgage from persons allowed to hold themselves out as owners and that the principle of S. 41, T. P. Act, should be applied, he having advanced money bona fide without notice of the defect in their title. The deed of gift was secretly executed and there is nothing to show Ma Sah knew anything about it. The deed of gift was, no doubt, executed on 27th October 1908 and the mortgage on 10th May 1910, but it is clear from the pleadings that Ma Sah had a plaint ready and tried to get Maung Pyu's signature to it on 8th May 1910, but failed owing to the influence of defendants 1 and 2. She had then to get another plaint ready and it was filed on 1st June 1910. She did not allow defendants 1 and 2 to hold themselves out as the owners of the property and appears to have taken action as soon as she became aware of the facts. The appellant says he has known Maung Pyu for 20 years and he lives just opposite. It can, therefore, hardly be possible that he did not know of his infirmity. He must have had some idea of the relations between the children and their father and at any rate the contents of the deed and his knowledge that some of the children had been disinherited was sufficient to put him on inquiry. He did not question Ma Sah and clearly cannot be treated as a bona fide holder for value who exercised reasonable care.

In my opinion therefore the appeal fails and is dismissed with costs. Advocate's fees two gold mohurs.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Lower Burma 142

PARLETT, J.,

Maung Tha Dun—Appellant.

v.

S. S. Chokalingam Chetty— Respondent.

Second Appeal No. 180 of 1911, Decided on 10th January 1913.

Civil P. C. (5 of 1908), O. 21, R. 91—R. 91 does not apply where judgment-debtor has interest in portion and not whole—If fraud of decree-holder in concealing judgment-debtor's real interest does not mislead, auction-purchaser cannot succeed.

Where an auction-purchaser of a certain land with two houses on it found that the judgment-debtor had interest only in the houses and not in the land and then sought to set aside the sale:

Held: that R. 91, O. 21, did not apply where the judgment-debtor had no saleable interest in a portion by only of the property sold at the auction. [P 142 C 2]

Held further: that the contention that the decree-holder knew that the judgment-debtor had no interest in the land and fraudulently concealed that knowledge was not supported by the fact found in the case, and that even if fraud was resorted to the plaintiff was not misled by it :9 *Cal.* 626; 23 *All.* 355 and 27 *All.* 537, *Foll.*; 28 *Cal.* 235, *Dist.* [P 143 C 2]

Villa—for Appellant.

A. B. Banerji—for Respondent.

Judgment.—At an auction sale held in execution of a mortgage decree against the late Mg. Gale, appellant bought for Rs. 2,490 two houses and the land they stood on. It has now been finally held that Mg. Gale had no right, title or interest at all in the land. The houses without the land are valued by appellant at Rs. 200, and there is evidence that their value does not exceed Rs. 600. The purchaser sues the decree-holder and the judgment-debtor's legal representative to set aside the sale altogether and to recover his purchase money with interest, his claim against the judgment-debtor's legal representative being in her representative capacity and to the extent only of the surplus over and above the decretal amount which may come into her hands.

The main argument for the sale to be set aside is that the interests in the land and in the houses on it were separable, and that as the judgment-debtor had no saleable interest at all in the land, the entire sale can be set aside under R. 91, O. 21. There is abundant authority that this rule does not apply where the judgment-debtor has no saleable interest in a portion only of the property though the majority of the cases quoted, *Ram Coomar Dey* v. *Shushee Bhushun Ghose* (1), *Shanto Chundar Mukherji* v. *Nainsukh* (2) and *Mohamed Rahmat Ullah* v. *Bachcho* (3), refer to sales of property in the whole of which the judgment-debtor had only a partial interest. But the Calcutta case of *Sonaram Dass* v. *Mohi*-

(1) [1883] 9 Cal. 626.
(2) [1901] 23 All. 355=(1901) A. W. N. 101.
(3) [1905] 27 All. 537=(1905) A. W.N. 99=2 A. L. J. 244.

ram Dass (4) is exactly like the present case, inasmuch as there the judgment-debtor had an interest in a portion only of the land sold, and none whatever in the remainder, and it was held, following an earlier Madras case *Sundara Gopalan* v. *Venkatavaradu Ayyangar* (5) that the sale could not merely on that ground be set aside, nor could the auction-purchaser claim a refund in proportion to the extent to which the judgment-debtor had no interest in the property sold.

The next ground advanced is fraud on the part of the decree-holder, the allegation being that he knew the judgment-debtor had no interest in the land and that his concealment of that knowledge and his bringing the land to sale constituted fraud, appellant being thereby induced to buy. Both the lower Courts fully set out the facts, and the Subdivisional Court decided that the decree-holder did not know the judgment-debtor had no interest in the land. The Divisional Court indeed was of opinion that he knew of Ma Ma Gayi's application, but whether that of 23rd October 1908, or that of 27th February or that of 24th March 1909 is not stated; neither is there evidence on which the opinion is based, and I find none: on the contrary there is evidence that his pleader knew nothing of her first petition when he filed his application for review of judgment on 29th October 1908. On the other hand, there is a good deal of evidence tending to show that he believed the judgment-debtor had an interest in the land as well as in the houses thereon. On the very day of Ma Ma Gyi's deed of gift to him, the land was changed from her name to his in the revenue registers. In the mortgage deed of 19th November 1906 he mortgaged the land as well as the houses to the decree-holder: when he obtained a decree not covering the land he got his pleader, who had no knowledge of Ma Ma Gyi's claim to it, to apply for a review, and obtained it. When Ma Ma Gyi sued to establish her right to the land both the decree-holder and appellant contested her suit up to the highest Court on the grounds that she had transferred the land as well as the houses. The finding of the Subdivisional Court on the point was clearly justified. At the hearing plaintiff endeavoured to prove that Solayappa Chetty assured him that if the land was not comprised in the property sold he would refund the money: the only support for this is the evidence of a man once in jail, a rent free tenant and former witness of plaintiffs, but there is evidence that Solayappa was not in this country at all during the suit or at the time of the sale. The allegation cannot be believed. In this appeal it was urged that on the authority of *Mohamed Kala Mea* v. *A. B. Harperink* (6) the sale should be set aside. In that case the purchaser was misled by an inaccurate statement as to the property being sold made at the sale by the Court's officer. In the present case there was nothing of the kind. That when the sale was ordered under the original mortgage decree the bailiff was expressly warned not to sell the land is immaterial. The Court reviewed that judgment including the land and expressly ordered the bailiff to sell the land as well as the houses. The bailiff explained and carried out those orders: it was his duty to do nothing more; nor would he have been justified in doing more. Appellant alleged in his evidence that the bailiff told him that the land was for sale and if there were any complications the Court would, or might, refund the money. This is denied and is improbable in the extreme and cannot be believed.

Apart however from all this there is an admission by plaintiff himself which I consider completely puts him out of Court as regards his pleas of fraud on the part of the decree-holder or misrepresentation by the bailiff. He swore before the purchase, I understood that the land, i. e., houses and site, "belonged to Ma Ma Gyi," in other words even if the decree-holder had concealed this knowledge, and even if the bailiff made a misrepresentation, the plaintiff was not misled thereby. He bought the property knowing quite well that the title to the land was uncertain, and with his eyes fully open to the risk he was running.

His appeal is dismissed with costs.

K.N./R.K. *Appeal dismissed.*

(4) [1901] 28 Cal. 235.
(5) [1894] 17 Mad. 228=3 M. L. J. 293.
(6) [1909] 36 Cal. 323=36 I. A. 32=1 I. C. 122 (P. C.).

A. I. R. 1914 Lower Burma 144

TWOMEY AND PARLETT, JJ.

Ma Thein Shin and *another*—Defendants—Appellants.

v.

Ah Shein—Plaintiff—Respondent.

First Appeal No. 3 of 1913, Decided on 19th May 1914.

Succession Act (10 of 1865), S. 331—Act does not apply to Chinese—Buddhist law applies—Forms of Chinese marriage are relaxed in case of poor.

Indian Succession Act does not apply to a Chinese Buddhist. Under S. 13, Burma Laws Act, Buddhist law should be applied to the inheritance of Chinamen. There is no written law on the subject of inheritance among Chinese Buddhists. The forms of first class Chinese marriage observed in China are not insisted on in the cases of Chinese marriages in Burma and relaxation is permitted in the case of poor people: 2 *L. B. R.* 95, *Foll.* [P 144 C 2 P 145 C 1]

R. N. Burjorjee—for Appellants.

Ormiston—for Respondent.

Twomey, J.—The plaintiff-respondent Ah Shein is the son of a Chinaman, In Ya, deceased. After the death of Ah Shein's mother, Ma Le, In Ya married Ma Thein Shein defendant-appellant 1, and had issue by her, a daughter Ma E Chi, defendant 2. Ah Shein sued Ma Thein Shin and Ma E Chi for his father's estate. Ah Shein being a minor filed the suit through his next friend Ma To, and was allowed to sue as a pauper. The value of the estate is put at Rs. 6,005. Ah Shein pleaded that his father In Ya was a Chinese Buddhist and that according to the law applicable to the case he was entitled to the whole of his father's estate to the exclusion of his father's second wife, the widow Ma Thein Shein, and her daughter Ma E Chi.

The defendants-appellants pleaded that Ah Shein's mother was not lawfully married to In Ya and that Ah Shein was therefore entitled to nothing. They denied that In Ya was a Buddhist. They also disputed the value of the property left to In Ya.

The District Court has found that In Ya was a Chinese Buddhist, that Ah Shein is the legitimate son of In Ya by his first wife Ma Le and that under the Customary law applicable to the case Ah Shein is entitled to the whole of his father's estate to the exclusion of the defendants-appellants. As regards the value of the estate the District Court came to no finding but appointed a commissioner "to find out what was the estate of In Ya, its value and any deduction which ought to be made therefrom, such as debts and funeral expenses, etc." The passing of orders as to Court-fees under O. 33, R. 10, was postponed until the value of the estate should be ascertained. In this appeal by the defendants it is argued that Ah Shein's mother, Ma Le, is not proved to have been legally married to In Ya, that the evidence as to the Customary law applicable to the case is insufficient and that the plaintiff failed to prove his title to the whole estate to the exclusion of his stepmother, and stepsister.

Although the defendants denied in the lower Court that In Ya was a Buddhist they have not appealed against the finding on this issue and their grounds of appeal, paras. 1 and 6, are expressly based on the assumption that In Ya was a Chinese Buddhist. It follows that the Indian Succession Act is not applicable to the case (vide S. 331), and that under S. 13, Burma Laws Act, the case must be decided according to Buddhist law. As explained in *Fone Lan* v. *Ma. Gyee* (1) the Buddhist law in such a case as this means the Customary law applicable to the deceased Chinaman, and it was for the plaintiff to prove his title under this law. First, as regards In Ya's alleged marriage with the plaintiff's mother Ma Le: The evidence shows that a member of In Ya's family asked for the girl in marriage from her uncle Tha Ku. There was a wedding feast. Presents were brought by Ma To, In Yar's cousin who had demanded the girl in marriage. In Ya and Ma Le lived together from that time up to her death. They opened a shop together at Allanmyo. They visited friends and relatives together and also went together to pagodas and kyaungs. Parker in his essay on Comparative Chinese Family Law mentions six preliminary steps to a first class marriage. But it is explained in a foot-note that though these forms are usual in China they are not indispensable. The evidence of Chinese elders produced for the plaintiff in this case shows that the customs are not insisted on in the case of Chinese marriages in Burma and that relaxation is permitted also in the case of poor people. The allegation for the defence that In Ya and Ma Le merely eloped and then lived together is not proved.

(1) [1903] 2 L. B. R. 95.

I think it is clear that In Ya had the intention of marrying Ma Le, that he carried out this intention as far as he could, that the couple became man and wife in the eyes of their families and their neighbours and lived together as such up to the time of Ma Le's death. It is a case in which apart from the wedding proceedings the ordinary presumption of marriage arises from long cohabitation with habit and repute, and this presumption has not been rebutted. I would therefore accept the District Court's finding as to the plaintiff's legitimacy.

There appears to be no written law on the subject of inheritance among Chinese Buddhists, and the case has to be decided according to somewhat meagre oral evidence produced by the plaintiff. The defendant Ma Thein Shein produced no evidence at all on the subject. The evidence of Ko Sit O and Itaik shows that daughters are altogether excluded by sons. But neither of these witnesses supports the view taken by the District Court that the widow gets nothing. Ko Sit O says: "The wife inherits from the husband, I do not know to what extent. It is a small portion." Itaik says: "The mother has a right somewhat over the estate;" but he was unable to say what her share would be. In the absence of definite evidence I think we may proceed according to justice, equity and good conscience and we shall not be far wrong in awarding the widow a third share which is the share she would have received if the Indian Succession Act were the law applicable to the case. I would therefore modify the decree of the District Court by awarding Ah Shein two-thirds of the estate of his father In Ya. The direction for the appointment of a commissioner to take accounts will stand. The order as to costs is set aside. The whole of the costs in both Courts will be borne by the estate. The court-fee in both Courts on Rs. 6,005-3-6, the amount at which the suit is valued in the plaint, will be recovered from the estate and will be a first charge thereon. A copy of the decree will be sent to the Collector, Maubin District.

Parlett, J.—I concur.

K.N./R.K. *Decree modified.*

1914 L. B. 19 & 20

A. I. R. 1914 Lower Burma 145

TWOMEY, J.

Emperor

v.

Po Han and *another* —Accused.

Criminal Revn. No. 323-A of 1913, Decided on 11th July 1913.

(a) Whipping Act (4 of 1909), S. 3—Abetment of theft or of offence mentioned under S. 3 by persons not juveniles—Whipping cannot be given.

Persons, other than juvenile offenders, who are convicted of abetment of theft or abetment of any other offence mentioned in S. 3 are not liable to the punishment of whipping. [P 146 C 1]

(b) Penal Code, Ss. 40 and 41—Ss. 40 and 41 contemplate such laws as create fresh offences.

The special laws contemplated by Ss. 40 and 41 are only laws, such as the Excise, Opium and Cattle Trespass Acts, creating fresh offences, that is, laws making punishable certain things which are not already punishable under the general Penal Code. [P 145 C 2, P 146 C 1]

(c) Whipping Act (4 of 1909)—Act provides punishment for offences already punishable under Penal Code.

The Whipping Act is not a special law. It creates no fresh offences but merely provides a supplementary or alternative punishment for offences already primarily punishable under the Penal Code, or, in the case of juvenile offenders, under other enactments. [P 146 C 1]

(d) Whipping Act—Act must be construed in favour of subject.

As the Whipping Act is a highly penal enactment, it must be construed in a sense most favourable to the subject. [P 146 C 1]

Judgment.—The Cantonment Magistrate convicted accused 2 of abetment of theft under S. 380, read with S. 109, I. P. C., and sentenced him to undergo a whipping. Accused 2 is not a juvenile offender as defined in the Whipping Act and it is necessary to consider whether the sentence of whipping passed upon him is authorized by S. 3, which provides this punishment for the substantive offence of theft but makes no mention of abetment.

The words "punishment provided for the offence" in S. 109, I. P. C., mean the punishment provided for the offence either in the Penal Code or in some special or local law: see Ss. 40 and 41. It might be argued that the Whipping Act is a "special law" within the meaning of S. 41, as it is a law "applicable to a particular subject," namely, whipping and accordingly, that the abetment of theft is punishable with whipping because this form of punishment is provided for the substantive offence, theft, in S. 3, Whipping Act. But it appears to me that the special laws contem-

plated in Ss. 40 and 41 of the Code are only laws, such as the Excise, Opium and Cattle Trespass Acts, creating fresh offences, that is, laws making punishable certain things which are not already punishable under the general Penal Code. The Whipping Act is not a special law in this sense; it creates no fresh offences, but merely provides a supplementary or alternative form of punishment for offences which are already punishable primarily under the Penal Code or (in the case of juvenile offender) other enactments. I think this is the only view consistent with the language of the Whipping Act itself. For S. 4 expressly provides the punishment of whipping for abetment of rape and S. 5 expressly provides it for abetments by juvenile offenders. If it was intended that abetment of the offences mentioned in S. 3 should also be punishable in this way, the intention would, no doubt, have been clearly expressed, and as it is not so expressed, the intention of the law must be that abetments of these offences should be punishable only under the Penal Code. This intention would be defeated if the Whipping Act were regarded as a special law under Ss. 40 and 41, I. P. C.

As the Whipping Act is a highly penal enactment, it must be construed in the sense most favourable to the subject.

It must be held therefore that persons convicted of abetment of theft or abetment of any of the other offences mentioned in S. 3, Whipping Act, 1909, are not liable to the punishment of whipping.

As whipping in this case has been carried out, nothing can be done beyond pointing out the illegality of the sentence.

K.N./R.K. *Order accordingly.*

A. I. R. 1914 Lower Burma 146

ORMOND, J.

Eng Leong & Co.—Plaintiffs—Appellants.

v.

B. I. S. N. & Co. Ltd.—Defendants—Respondents.

Civil Revn. Appln. No. 163 of 1912, Decided on 12th January 1914, from jungment and decree of Small Cause Court, Rangoon, D/- 17th October 1912.

Shipping—Bill of lading—Goods must be delivered on proof of ownership—In spite of instruction from consignee if goods delivered to person holding bill of lading company is liable—Loss of bill of lading must be proved to be bona fide.

When a person has proved that he is the owner and the consignee of certain goods, the shipping company are bound to deliver the goods to him.

The company would not be bound to deliver the goods to anyone that produced the bill of lading, and if after notice from the consignee not to do so, they give delivery to the wrong person, they do so at their own risk. [P 146 C 2]

The consignee having lost the bill of lading, the shipping company are entitled to be satisfied that that was bona fide. [P 147 C 1]

Chit Maung—for Appellants.

Lentaigne (Jr.)—for Respondents.

Judgment.—The plaintiff-appellant sued in the Small Cause Court for the value of four cases of goods short delivered by the defendant company which were consigned from Bombay. He is unable to produce his copy of the bill of lading and states on oath that he has lost it. The defendant company produced a copy which shows that seven cases were shipped. Plaintiff admits having taken delivery of three. The manifest also shows that seven cases were shipped. The onus is therefore on the defendants to show that they delivered the four remaining cases. They are unable to do so.

It is contended for the defendants that inasmuch as the plaintiff does not produce the bill of lading defendants are not obliged to deliver. But when the plaintiff has proved that he is the owner and the consignee of the goods the defendants are bound to deliver the goods to him. The defendants would not be bound to deliver the goods to anyone that produced the bill of lading, and if after notice from the consignee not to do so they gave delivery to the wrong person, they would do so at their own risk. The defendants do not say that they have delivered the goods under the bill of lading to anyone.

The three packages were landed on 13th October 1912 and plaintiff claimed as the value of these goods the sum of Rs. 269-11-0. From the invoice which he puts in evidence, the value is given as Rs. 72 and the freight on that would amount approximately to Rs. 3-8-0. The learned Judge in the Small Cause Court has, I think, found that the plaintiff was not entitled to recover because he did not produce the bill of lading.

There should therefore be a decree for the plaintiff for Rs. 75-8-0.

The plaintiff having lost the bill of lading, defendants were entitled to be satisfied that that was bona fide.

The plaintiff's claim was evidently to a great extent fraudulent as to the amount; and in the circumstances I think both parties should bear their own costs throughout.

K.N./R.K. *Order accordingly.*

A. I. R. 1914 Lower Burma 147

TWOMEY, J.

Haji Sadulla—Applicant.

v.

Jawahir Karim Bux—Plaintiff—Respondent.

Civil Revision No. 2 of 1913, Decided on 28th January 1914.

Contract Act, S. 19—Suit by purchaser to recover price of house from broker and attesting witness identifying vendor before registration officer on ground of fraud and misrepresentation—Claim decreed against both but finding of Court stated that identifier did not know that representation was false—Finding held to be defective.

The purchaser of a house sued to recover its price from the broker who had arranged the sale and the attesting witness who had also identified the vendor before the registration officer on the ground of false representation by the broker and false identification by the witness. The lower Court decreed the claim against both defendants, but its finding against the identifier was only this: that though he pointed out the false man as the real owner, he did not know that the representation was false;

Held: that the finding is defective and that for the plaintiff to succeed as against the identifier it was necessary to prove that he represented the false man to be the owner of the property sold and that he made this representation knowing it to be false, or made it without belief in its truth or recklessly without caring whether it was true or false and also that the plaintiff was intended to act and did in fact act in reliance on the said representation: *Peek* v. *Derry*, 37 *Ch. D.* 541, *Rel. on.*

[P 148 C 2]

Vertannes—for Applicant.

Israil Khan—for Respondent.

Judgment.—The plaintiff-respondent Jawahir Karim Bux, on 15th May 1911, bought a house for Rs, 700 through a broker, Mahomed Ismail from a man representing himself to be the owner, Girdhari Ranchod Tulai. The conveyance was attested by the plaintiff-respondent's friend Haji Sadulla and according to the endorsements made at the registration office it was Haji Sadulla who identified the vendor. When the plaintiff-respondent went to take possession he found that he had been cheated. The person who posed as vendor and took the Rs. 700 was not the owner Girdhari at all. The plaintiff-respondent tried to find the false Girdhari without success. He then prosecuted the broker Mahomed Ismail for cheating him by representing that the person to whom the plaintiff respondent paid the money and who then disappeared was Girdhari, the owner of the house. Haji Sadulla was the plaintiff-respondent's chief witness in the criminal case and the case ended in the conviction of Mahomed Ismail, the fraudulent broker, who was sentenced to to suffer three months' rigorous imprisonment and a fine on 11th March 1912. On 28th May 1912 the plaintiff-respondent filed the present suit in the Small Cause Court against both Mahomed Ismail and Haji Sadulla claiming that the broker Mahomed Ismail and the "identifier" Haji Sadulla jointly had induced him to pay his money, Rs. 700, to the false Girdhari representing him to be the real Girdhari who was owner of the house. The plaintiff-respondent asked for a decree against both Mahomed Ismail and Haji Sadulla for the amount of the purchase money paid to the false Girdhari together with the costs of the conveyance. The learned Judge has granted a decree as prayed against both defendants. There can be no doubt as to the liability of the broker Mahomed Ismail. But, defendant 2, Haji Sadulla, applies for revision, mainly on the ground that he is not proved to have made any representation with intent to deceive the plaintiff-respondent.

The plaintiff-respondent relied upon the record of the Criminal Trial (No. 441 of 1911, 1st Additional Magistrate, Rangoon) as "the chief material to prove his case in Court": vide affidavit of 11th September 1912 and it was called for and presumably put in evidence.

The criminal record does not support the plaintiff-respondent's case as against Haji Sadulla. If the plaintiff-respondent considered that Haji Sadulla had conspired with Mahomed Ismail to cheat him one would expect that Sadulla would have been definitely charged as an abettor in the criminal case. When first examined Jawahir did say: "The accused (Mahomed Ismail) and Haji

Sadulla cheated me by inducing me to believe that the man brought by them was the owner of the house." But the evidence shows that it was Mahomed Ismail alone who brought the false Girdhari to the registration office. There is no evidence whatever to show that Haji Sadulla knew either the false or the real Girdhari, and nothing to show that Jawahir had any reason to think that Haji Sadulla did know the real or the false Gitdhari. In the criminal case Jawahir stated definitely in cross-examination: "Haji Sadulla did not tell me he knew Girdhari. I swear by the Koran in my hand that Sadulla did not tell me that that man (i. e., the false Girdhari) was Girdhari." Jawahir further said "Haji Sadulla identified Girdhari in the registration office because the accused (Mahomed Ismail) asked him to do so. Haji Sadulla was my adviser in the transaction." Finally he said: "I have no suspicion on Haji Sadulla." The Magistrate's judgment exculpates Haji Sadulla. The following passage shows the Magistrate's view: "It is an admitted fact that Haji Sadulla had identified the vendor as Girdhari in the registration office, but it appears to me that he had done so because the accused (Mahomed Ismail) had made both the complainant and Sadulla believe that the man was the vendor (i. e., that the man was the real owner).

As to what really happened at the registration office the evidence is clear. The false Girdhari went in, but the fraudulent broker Mahomed Ismail made an excuse for staying outside and asked that the purchaser's friend Haji Sadulla should act as identifier before the registration officer. Sadulla agreed and thus his name appears as identifier in the endorsement.

In the criminal case in order to get Mahomed Ismail punished, it suited Jawahir to say that he had no suspicion against Haji Sadulla, and that the latter acted as identifier in the registration office only because Mahomed Ismail asked him to do so. But two months after Mahomed Ismail was convicted, Jawahir came to the civil Court with his story that he was actually induced to pay the Rs. 700 because Haji Sadulla as well as Mahomed Ismail vouched for the identity of the vendor Girdhari.

For the plaintiff to succeed as against Sadulla it was necessary to prove that Sadulla represented the false Girdhari to be the owner of the property sold and that he made this representation knowing it to be false or made it without belief in its truth or recklessly without caring whether it was true or false :-*Peek* v. *Derry* (1). It was also necessary to show that the plaintiff was intended to act and did in fact act in reliance on the said representation.

The learned Judge on the evidence of the registration clerk and in view of the endorsement showing Sadulla to be the identifier, found it proved beyond doubt that Sadulla did point out the false Girdhari as the owner. As to Sadulla's knowledge and intention the Judge's finding is that as Sadulla denied having identified the false Girdhari as the owner he cannot be held to have had an honest belief in the truth of the representation that the false Girdhari was the owner. But the Judge acquits him of actual knowledge that the representation was false.

It will be seen that the findings of the lower Court are defective as there is no decision as to whether the plaintiff relied on Sadulla's alleged representation as to the vendor's identity. It was all the more necessary to come to a finding on this point since the Magistrate who convicted Mahomed Ismail decided that Mahomed Ismail deceived Sadulla as well as Jawahir,

As regards the identification at the registration office all that Mr. Gregory, the clerk, could say was that he always asked the identifier whether he knew the contracting parties and was sure he did so in this case. This is, in my opinion, a very slender basis for the conclusion drawn by the Judge. So far as the evidence shows, Sadulla like the plaintiff-respondent, had met the false Girdhari for the first time that day and neither of them knew the real Girdhari. Sadulla did not go to the registration office to act as identifier. He went to the plaintiff-respondent's friend and it was apparently expected by the plaintiff-respondent that the broker Mahomed Ismail who knew the other contracting party would act as identifier. But at the last moment Mahomed Ismail backed out and asked Sadulla to act as

(1) [1888] 37 Ch. D. 541=57 L. J. Ch. 347=59 L. T. 78=36 W. R. 899.

identifier. It was foolish of Sadulla to accede to this proposal, but as he and the plaintiff respondent both trusted the broker they saw no objection to it at the time. In the circumstances I think it is plain that Sadulla in identifying the false Girdhari before the registrar was relying (as the plaintiff-respondent himself was relying) on the word of the broker that the false Girdhari was the right man. If the plaintiff-respondent was content with the broker's word on this point Sadulla too might well be content with it. In the Small Cause Court, Sadulla said: "Mr. Gregory asked me if I knew the parties and I said I did not know the seller." This statement is probably untrue and it shows to what extremes man will go in defending a suit. It would have been sufficient for Sadulla to say: "I identified the false Girdhari as the vendor because Mahomed Ismail, the broker, assured both Jawahir and me that this was the xendore and we both believed him, and Jawahir knew I had no knowledge as to the man's identity apart from Mahomed Ismail's assurance that he was Girdhari, the owner." This I think, is the true construction of what took place. I can see no reason whatever to hold that Jawahir relied on Sadulla's identification at all. For, as already stated, there is nothing to show that Sadulla knew the false from the real Girdhari and nothing to show that the plaintiff-respondent had reason to believe that Sadulla had this knowledge. It is not even snggested that Sadulla conspired with Mahomed Ismail to cheat the plaintiff-respondent or that Sadulla gained any benefit whatever from the transaction. It must be held that the plaintiff respondent acted on the representation of defendant 1. Mahomed Ismail only. The decree so far as Sadulla is concerned is set aside and the plaintiff-respondent will pay Sadulla's costs in both Courts.

K.N./R.K. *Decree set aside.*

A. I. R. 1914 Lower Burma 149

ORMOND AND PARLETT, JJ.

Ma Tin Lun and *another*—Plaintiffs—Appellants.

v.

Ma Dwe and *another*—Defendants—Respondents.

First Appeal No. 122 of 1911, Decided on 7th January 1914.

Buddhist Law (Burmese) — Succession — Separation of children not due to divorce but due to father, separation does not disentitle children to inherit—Filial neglect must be proved by person alleging to exclude children from inheritance.

Where no divorce is proved or admitted, and the separation between father and children is entirely the act of the father, the separation cannot deprive the childen of their right to inherit.

There must be some filial neglect to exclude children from inheritance, and the burden of proving exclusion lies on the person who asserts it. [P 151 C 1]

Giles—for Appellants.

McDonnell—for Respondents.

Parlett, J.—The history of the parties as it appears from the record is as follows: The plaintiffs are the children of Maung Po Aung by his first wife Ma Hnin Yin, Ma Tin Lun being born about a year after their marriage, while the couple were still living with Ma Hnin Yin's parents in Rangoon. In the year 1245 B. E. (1888-84) when Ma Tin Lun was five years old her parents moved to Prome to trade in tea. It appears that Ma Hnin Yin's father, U Paw Gyi, was one of Po Aung's partners in that business. The next year they returned to Rangoon to U Paw Gyi's house where Maung Ba Hla, plaintiff 2, was born shortly afterwards. About three months later the family returned to Prome. The witnesses differ as to how long they stayed there; according to plaintiff's witness, Maung In, it was until 1248, but according to the defendant's witness, Mung Po Maung, Po Aung had been living alone in Prome for about two years in 1248 (1886-87). At any rate he got tired of his wife, who was older than he and had an unpleasant voice and he brought her and the children down to Rangoon to her father's house, but refused to go there himself. He and his father-in-law fell out, ostensibly over business matters, and he was unsuccessfully prosecuted for misappropriation. Then he returned to Prome and in 1248 married Ma Gyi, a well-connected lady, after assuring her father that he had

divorced Ma Hnin Yin. In 1249 (1887-88) Maung On Kin, defendant 2 was born. Ma Gyi died in 1251 or 1252 (1890 or 1891), and Ma Hnin Yin in 1255 (1893 94). The latter and Po Aung had no communication with each other since they last came from Prome, some seven years or more before her death. The plaintiffs lived with their mother till her death, and afterwards with her relations. Po Aung came down to Rangoon again with his son On Kin and lived for two or three years with his cousin Po Zon. In 1897 he married Ma Dwe, defendant 1 and lived with her and Maung On Kin till his death in 1906. In the present suit the plaintiffs claim a one-eighth share of the joint property which he left at his death. Any such joint property as there may be was acquired during the marriage with Ma Dwe, as it is admitted that Po Aung brought no property whatever to that marriage.

The defence is that Po Aung and Ma Hnin Yin were divorced and that plaintiffs having gone to live with their mother are not entitled to inherit from their father, and further that in any case they have forfeited their right of inheritance by reason of their failure to maintain filial relations with their father.

It is admitted in this appeal that if there was a divorce, plaintiffs are, under the circumstances of this case, excluded from inheriting from their father. The District Court however held that the divorce was not established. The defendants challenge this finding in appeal. It is true that the parties were separated for six or seven years before Ma Hnin Yin's death and that Maung Po Aung gave out to Ma Gyi's relatives in Prome that he had divorced her, but there is no evidence that she ever consented to it, or ceased to regard herself as his wife. Nor is there any evidence that a division or surrender of property accompanied the separation from which a divorce might be inferred. It is true that Po Aung had nothing left by 1897 when he married Ma Dwe, but there is no evidence that he had nothing when he married Ma Gyi. He probably had property then, but if he had not, its absence was as likely due to the unfortunate outcome of his business venture with his father-in-law, as to his having surrendered it to Ma Hnin Yin. The latter's relations appear to have been quite well off to support her and her children without her receiving anything from Maung Po Aung. I agree with the District Court that the divorce was not established.

That Court however held that plaintiffs were not entitled to inherit from Po Aung as they lived separately from him and ceased to maintain filial relations with him. It is admitted that they never associated with their father after he and their mother separated; they invited him to the ceremony of Maung Ba Hla's initiation into the Buddhist priesthood but he neither came nor contributed to the expenses. They also attended his funeral. There is evidence that Po Aung thanked their uncle, Maung In, for taking care of them and asked him to keep them till he was settled. It appears to me that the separation was entirely the act of the father and not of the children and that it lay upon him to terminate it if he wished; that it was not open to them to force themselves upon him, or to do more than they did. It is quite clear however that he did not want them back, though they, on the other hand continued to regard him as their father. It cannot be said that they voluntarily separated themselves from him or that the cessation of filial relations between them was due to any act or omission on their part. In all the cases relied on by the District Judge there had been a divorce, and they therefore are not directly applicable to a case like the present where no divorce is proved or admitted. No doubt under Burmese Buddhist law the duties of a child to parent are more exacting than those of a parent to a child, but it has long been held that only when desertion or neglect is proved against those entitled to inherit can they be excluded, *Nga San Yun* v. *Nga Myat Thin* (1). In *Maunga Sa So* v. *Ma Paw* (2) it was held that living apart from parents and not attending in illness does not of itself rupture family ties or disqualify children from inheriting, and this apparently would be the rule even if the separate living was the voluntary act of the children and not, as in the present case, entirely the act of the parent.

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(1) S. J. 46.
(2) [1902-1903] 2 U. B. R. Probate and Administration 7.

Again in *Ma Taik* v. *Ma Nyum* (3) it was laid down that there must be some filial neglect to exclude and that the burden of proving exclusion lies on the person who asserts it. That case, like the present, was one in which there was no divorce. The rule has since been held to apply to stepchildren in *Maung Kyaw Yon* v. *Maung Po Win* (4). In my opinion in the present case there has been no estrangement or neglect on the part of the children, who did all that could be expected of them and were apparently ready to renew filial relations with their father. The separation however was entirely his act and he showed clearly that he wished to have no more to do with them. Such conduct cannot deprive them of their right to inherit, nor do I consider that they have done anything to forfeit it. I would reverse the decree of the District Court and instead would hold that plaintiffs are entitled between them to a 1/8th share of the joint property of Maung Po Aung and Ma Dwe left by Maung Po Aung, and would direct the District Court to decide issues 6 and 7 and pass a decree accordingly.

I would order respondents to pay the costs of this appeal.

Ormond, J.—I concur.

K.N./R.K. *Decree reversed.*

(3) [1897-1901] 2 U. B. R. 193.
(4) [1904-1906] 2 U. B. R. Bud. Law, Inheritance 1.

A. I. R. 1914 Lower Burma 151

ROBINSON, J.

A. T. K. P. L. Chetty—Applicants.

v.

S. K. R. S. S. T. Chetty Firm—Respondent.

Civil Revn. Petn. No. 155 of 1912, Decided on 21st January 1914.

(a) Contract Act (9 of 1872), S. 90, Illus. (e)—Handing over of delivery order is not in itself sufficient to give possession.

The handing over of a delivery order is not sufficient to give possession without something further. An order to the ware houseman or miller must be accompanied by his assent to the transfer : 8 *Bom.* 501, *Foll.* [P 151 C 2]

(b) Contract Act (9 of 1872), S. 90, Illus. (e) — Constructive delivery must have effect of putting goods in buyer's possession.

In cases of constructive delivery, the delivery must have the effect of putting the goods in the possession of the buyer and this effect must be clearly created and established. [P 152 C 1]

Dantra—for Applicants.

Billimoria—for Respondents.

Judgment.—On 16th June 1911, defendants bought from Messrs. Steel Bros. and Co. Ltd. A. I. Coodie rice at Rs. 300 per 100 baskets, the amount being 1,500 baskets minimum and 2,000 baskets maximum. Delivery to be taken Ex-Hopper in July. The contract number was 295.

On 23rd June 1911 defendants sold 2,000 bags of the same quality at Rupees 305 per 100 bags to plaintiffs, the rice to be from Messrs. Steel Bros. and Co. Ltd. or the Burma Rice and Trading Co.'s Mills.

Messrs. Steel Bros. had another contract with defendants for 2,000 bags that was entered into on 16th June 1911.

As against their contract with plaintiffs the defendants handed over to them two delivery orders on Steel Bros. for 554 and 1,000 bags respectively. It is by no means clear whether Steel Bros. when these orders were presented, accepted them in full or not but it is certain that they did supply 54 bags less than the total amount. They at first thought they had supplied too little and a fresh delivery order was made out for 54 bags but this was subsequently cancelled. The reason was that under the contract No. 295, specified above, they were not bound to supply more than 1,500 bags and this is pointed out in their letter, Ex. D. They were willing to refund the value at their contract rate but plaintiff had paid more. Plaintiffs then sued defendants for the value of 54 bags not supplied and for damages. They failed as to damages, as the market-rate had not altered, but were given a decree for the rest of their claim.

Defendants now urge that the handing over of the delivery orders was equivalent to giving possession of the goods and that no claim exists against them.

Section 90, Contract Act, and Illus. (e) to that section clearly set out the legal position. The handing over of a delivery order is not sufficient without something further. The order to the warehouseman or miller must be accompanied by their assent to the transfer. This has been laid down in *Le Geyt* v. *Harvey* (1), and in the English cases cited under S. 90 in Sir F. Pollock's work on the Contract Act.

It is urged that Messrs. Steel Bros. did assent but the only possible view on

(1) [1884] 8 Bom. 501.

the evidence is, I think, that a mistake arose and they did not assent to more than the transfer of delivery orders relating to contract No. 295. The delivery orders were "subject to the terms of contract No. 295" and the bills to plaintiffs were against the same contract under which they were not bound to supply more than 1,500 bags in all. In cases of constructive delivery the delivery must have the effect of putting the goods in the possession of the buyer and this effect must be clearly created and established.

It is admitted that the learned Judge was in error in calculating the amount. Plaintiffs only asked for Rs. 446-1-0.

In my opinion therefore the revision fails but the decree is modified and will stand for Rs. 446 1-0 otherwise the revision is dismissed with costs on Rs. 446-1-0 Advocate's fees two gold mohurs.

K.N./R.K. *Revision dismissed.*

A. I. R. 1914 Lower Burma 152 (1)

ORMOND, J.

Nag Ba E—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 217 of 1914, Decided on 25th May 1914.

Penal Code (45 of 1860), Ss. 302, 34 and 326—Out of three injuries by several accused one was slight, other dangerous and third fatal—Accused stated he hit with cane—Common object held could not be presumed to be more than causing grievous hurt.

The appellant and his companions went together to strike the deceased. The appellant was found to have inflicted only one injury out of three, all of which were contused wounds caused by blunt weapons. One was on the left eye and was slight ; the second on the nose and dangerous to life but could be cured ; and the third on the parietal bone which fractured the skull was necessarily fatal. The appellant stated that he inflicted one blow with a light cane :

Held : that it would not be safe to assume that the common act intended by all the assailants was more than to cause grievous hurt.

[P 152 C 2]

Judgment.—This appellant, Ba E, has been convicted under S. 302, I. P. C, and sentenced to transportation for life for the murder of Mg. Pe.

Ba E with four others, Mg. Nge, Mg. Nyilk, Mg. Tin and Mg Pit, came along the village street at night and found Mg. Pe and Mg. Pyaung sitting together. Mg, Pe received three wounds ; he became unconscious and died on the way to the hospital. Mg. Pyaung ran off to Mg. Sek's house saying that a man had been struck. Mg. Pyang did not say at first who struck the deceased. The next day he told the Sub-Inspector that Ba E was the culprit. Mg. Pyaung in his evidence says that the saw Ba E strike Mg. Pe once and that he then ran away. Ba E before the Subdivisional Magistrate says that he and his four companions went to give the deceased a beating, because Mg. Pe had courted Mg. Pit's sister and had once chased Mg. Pit with a gun. He says that he, Mg. Nge and Mg. Tin each beat the deceased with a stick and tied the three sticks together and threw them into a well which he pointed out. Two sticks and one axe tied together were recovered from that well. The Sessions Judge has found, and I think rightly, that the appellant probably inflicted only one injury and that the other two injuries were inflicted by the others : but he has held the offence to be murder under S. 34 I P. C. One wound was on the left eye and was slight. Wound No. 2 was on the nose which was dangerous to life but which could have been cured. Wound No. 3 on the parietal bone which fractured the skull was necessarily fatal. All wounds were contused wounds, inflcted by blunt weapons ; so if the axe was used there probably no actual intention of causing death.

The accused states that he inflicted the blow with a light cane which could not of course cause either of the two serious injuries. I do not think it would be safe to assume that the common act intended by all three assailants was more than to cause grievous hurt to the deceased.

I alter the conviction to one under S. 326, I. P. C., and reduce the sentence to one of seven years' transportation.

K.N./R.K. *Conviction altered.*

A. I. R. 1914 Lower Burma 152 (2)

HARTNOLL, OFFG. C. J. AND YOUNG, J.

P. M. P. A. N. Annamalay Chetty—Defendant—Appellant.

v.

Shaik Mahomed Ismail and *others*—Plaintiffs—Respondents.

First Appeal No. 46 of 1912, Decided on 5th September 1913, against judgment and decree of Chief Court, D/- 1st April 1912, in Civil Regular No. 313 of 1911.

Mahomedan Law—Gift—Mahomedan Law applies to settlements by Sunni Mahomedan —Life estate being inconsistent, donee takes absolute estate.

In construing a deed of settlement executed by a Sunni Mahomedan of Rangoon the law applicable is the Mahomedan Law. [P 154 C 1]

The creation of a life estate is inconsistent with the Mahomedan law, and where a life estate is attempted to be created the donee takes an absolute estate. [P 155 C 2]

Giles —for Appellant.

B. Cowasjee —for Respondents.

Hartnoll, Offg. C. J.—The point for decision in this appeal is whether a deed of settlement is valid or not. A Sunni Mahomedan, one Shaik Dawood Maistry, on 8th April 1895 executed a deed of settlement, which sets out that on account of the natural love and affection which he bears to his daughter, Amirun Beebee, he transfers and assigns to her and her heirs as mentioned hereinafter a certain plot of land with the buildings thereon in trust subject to the following terms and conditions:

The deed then proceeds:

"1. That I appoint myself as sole trustee of the said property to realize the rents and profits thereof and apply the same towards the maintenance of the said Amirun Beebee who is now a minor till she sttains her majority, that should I die before she attains her majority Sebina Beebee, her mother, will act as trustee for the aforesaid purpose."

"2. That as soon as the said Amirun Beebee attains her majority she shall be the sole trustee of the said property to apply the rents and profits thereof for her own use and benefit."

"3. That after the death of the said Amirun Beebee her children will enjoy the rents and profits thereof and on the youngest of them attaining his or her majority, the said property is to be divided among them in equal shares and in the event of the said Amirun Beebee dying without any issue, her brothers and sisters will share the said property among them in equal shares"

The suit has arisen in this way. Amirun Beebee has married and her husband is respondent 3. She has a minor son, Shaik Mahomed Ismail, who is respondent 1 and plaintiff and is represented by his next friend and uncle Ali Ahmed. Shaik Dawood Maistry died in 1898. On 23rd February 1911, the appellant who is defendant 1 obtained a mortgage decree against Amirun Beebee and her husband Shaik Goolam Kader, respondent 3, on the property described in the deed of settlement claiming the same to belong absolutely to Amirun Beebee. Shaik Mahomed Ismail claims that his mother has only a life interest in the property and asks a declaration to such effect and that the mortgage decree obtained by appellant does not affect the property dealt with by the deed of settlement and that appellant has only a mortgage lien over the life interest of Amirun Beebee in the income of the said property.

The learned Judge on the original side has decreed the suit on the authority of the case of *Umes Chunder Sircar* v. *Mt. Zahur Fatima* (1). The mortgagee, the appellant, urges that by the deed Amirum Beebee has acquired the full property in the premises mentioned in it.

The first point for decision is whether the Mahomedan law or the general law applies.

For the minor it is urged that this is not a question of succession or inheritance and so S. 13 (1), Burma Laws Act, does not apply. There is not sufficient evidence on the record to show whether the case is one of succession or inheritance as there is nothing to show what other property the settlor had. If he settled all his property on his daughter and the others mentioned by the deed it would, in my opinion, be an attempt to evade the Mahomedan law of succession and so would be a matter of succession or inheritance within the meaning of S. 13 (1), Burma Laws Act. But supposing that it is only a disposal of his property that does not conflict with the rules of his personal law; the question arises whether the Mahomedan law is not applicable in the matter. S. 13 (2), Burma Laws Act, enacts that subject to the provisions of sub S. (1) and of any other enactment for the time being in force all questions arising in civil cases instituted in the Courts of Rangoon shall be dealt with and determined according to the law for the time being administered by the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction. That Court administers the provisions of the Transfer of Property Act 1882. S. 2 of this Act enacts that nothing in Ch. 2

(1) [1890] 18 Cal. 164=17 I. A. 201 (P.C.).

of it shall be deemed to affect any rule of Hindu, Mahomedan or Buddhist law. The deed of settlement is a transfer of property of the nature of that contemplated by Ss. 20 and 21 of the Act and they fall within Ch. 2. Taking the deed to be one falling within the provisions of Ch. 2 the law applicable to it in the High Court at Calcutta would be the Mahomedan law and not the law contained in the Transfer of Property Act. Looking at the deed as a gift Ch. 7, T. P. Act, must be considered. "Gift" is defined in S. 123 but S. 129 enacts that nothing in the chapter shall be deemed to affect any rule of Mahomedan law. The following cases show that at Calcutta in cases of gifts by Mahomedans, the Mahomedan law is followed : *Fatima Beebee* v. *Ahmad Bakhsh* (2), *Mullick Abdool Gafoor* v. *Muleka* (3) and *Yusuff Ali* v. *Callector of Tipperah* (4). Therefore in any case I would hold that the law applicable in constructing the deed is the Mahomedan law.

The consideration now arises as to what rule of the Mahomedan law is applicable. The judgment appealed from says that Shaik Dawood Maistry was a Sunni Mahomedan and this statement was not contested nor traversed at the hearing. I will therefore take it that he belonged to the Sunni and not the Shiah School of Mahomedanism. The Hedaya is therefore applicable to him. The passages at pp. 488 and 489 of Hamilton's translation of that work—Edn. 2—are relied on by appellant and especially the passage concerning an amree or life grant to this effect. "An amree, moreover, is nothing but a gift and a condition; and the condition is invalid; but a gift is not rendered null by involving an invalid condition, as has been already demonstrated." The learned author is, no doubt, referring to the passage at p. 488 where in dealing with a gift with a condition he writes: "Such gift or charity is valid; but the condition annexed is invalid, because it is contrary to the spirit or intendment of the contract; and neither gifts nor charities are affected by being accompanied with an invalid condition because the prophet approved of amrees (gifts for life) but held the condition annexed to them by the grantor to be void." Learned counsel for respondent urged that the Imam Abu Hanifa and his disciples Qazi Abu Yusuf and Imam Mahomed differed on the rule of law. I am unable to find that they did on the rule relating to amree; they differed on the rule of a gift by way of rikba, which is a different form of gift. The question of gifts with conditions is dealt with by Mr. Syed Ameer Ali in his learned book Vol. I Edn. 3, p. 77. and also by Sir R K. Wilson in his learned work, Edn. 4th p. 350. He comments on the case law up to date in the preface to the last edition of the book. In the case of *Mt. Humeeda* v. *Mt. Budlun* (5) their Lordships of the Privy Council expressed the opinion that the creation of a life estate does not seem to be consistent with Mahomadan usage and there ought to be very clear proof of so unusual a transaction. In the case of *Suleman Kader* v. *Dorab Ali Khan* (6) their Lordships said: "Their Lordhsips are by no means satisfied that the gift to this lady of these Government promissory notes subject to a condition that she is to have the interest only for life and that after her death there is to be a trust in perpetuity for all her heirs to all time, is not, according to Mahomadan law, in its legal effect, a gift to her absolutely, the condition being void." But they found that it was not necessary to determine the point. In the case of *Abdool Gofur* v. *Nizamudin* (7) their Lordships expressed the opinion that the creation of a series of life rents was a kind of estate which did not appear to be known to Mahomedan law. But the two most important cases seem to be those of *Atdul Wahid Khan* v. *Mt. Nuran Bibi* (8) and that of *Umer Chunder Sircar* v. *Mt. Zahoor Fatima* (1) already referred to.

In the latter case where by a Mahomedan deed of settlement a husband granted lands to his second wife, on condition that if she had a child by him the grant should be taken as a perpetual mukarrari and in the case of no child being born as a life mukarrari with remainder to the settlor's two sons, it was held that the two sons took definite in-

(2) [1904] 31 Cal. 919.
(3) [1884] 10 Cal. 1112.
(4) [1883] 9 Cal. 138.
(5) [1872] 17 W. R. 525.
(6) [1882] 8 Cal. 1=8 I. A. 117 (P.C.).
(7) [1893] 17 Bom. 1=19 I. A. 170 (P.C.)
(8) [1885] 11 Cal. 597=12 I. A. 91 (P. C.).

terests under the deed similar to vested remainders though liable to be displaced and that such interests were liable to attachment. The point under decision was which of the parties had acquired the ownership of certain lands first in point of time. There had been two sales in execution of two decrees, and in one case the respondent had bought the interest of her judgment-debtor in the lands, and in the other the appellants' predecessor-in-interest had also purchased the interest of his judgment-debtor, the same man, as respondents' judgment-debtor in the same lands. The report of the case does not show that the question was ever raised as to whether the settlement was not practically a deed of gift disguised by a nominal consideration and whether, if that were so the Mahomedan rule of law would invalidate either the gift itself or the limiting conditions. This question does not seem to have been raised for decision. In the other case, that of *Abdul Wahid Khand* v. *Mt. Nuran Bibi* (8), the legal effect of an instrument of compromise was directly for decision. The compromise was to the effect that one Gauhar Bibi, a widow of one Mouzzum Khan, was to hold possession of and be mistress of certain lands, but without power of alienation except in case of special emergency and that two sons of Mouzzum Khan by other wives were to possess and enjoy the lands after her death.

The suit was by the sister of one of the sons and half-sister of the other and others who had acquired an interest in the estate, and was brought after the death of the half-brothers and Gauhar Bibi against a daughter and widow of one of the half-brothers and the husband of the daughter. Gauhar Bibi had after the death of the half brothers executed a deed of gift in favour of the aforesaid daughter. The suit was for a share of the estate on the ground that it was settled that Gauhar Bibi should retain possession of the estate during her lifetime without power of alienation and that after her death both the sons should take the estate half and half. The claim was by virtue of inheritance from the two half-brothers. Their Lordships held that during Gauhar Bibi's life time the whole interest in the estate was to be in her and then said: "Then comes the question: What is the interest which is given by the compromise to the sons? To give the plaintiffs a title to the estate it must be a vested interest which, on the death of the sons, passed to their heirs, and is similar to a vested remainder under the English law. Such an interest in an estate does not seem to be recognized by the Mahomadan law." Their Lordships concluded their judgment by saying: "Their Lordships think this is the reasonable construction of the compromise in this case, and that it would be opposed to Mahomedan law to hold that it created a vested interest in Abdul Rahman and Abdus Subhan which passed to their heirs on their death in the lifetime of Gauhar Bibi."

The question arises as to which of these two cases should be followed in the present one, and as I have held that this case is one that must be determined by the rule of Mahomedan law, I would decide that the case of *Abdul Wahid Khan* v. *Mt. Nuran Bibi* (8) is the one to follow. In that case their Lordships decided on the rule of Mahomedan law, and in the other the rule of Mahomadan law was not referred to nor raised.

It only remains to consider what the actual rule of Mahomedan law is that is applicable to a deed like the one under discussion in the case of Sunni Mahomedans. I have already in this judgment set out the law and authorities relied on. In the case of *Abdoola Khakhibhoy Readymoney* v. *Mahomed Haji Suleman* (9) the Mahomadan law was discussed and it was held on a review of the authorities that the creation of a life estate is inconsistent with Mahomedan law, and that where a life estate is attempted to be created the donee takes an absolute estate. That view appears to me to be correct. I would therefore allow this appeal and reverse the decree passed by the learned Judge on the original side and dismiss the suit with costs to appellant in both Courts.

Young, J.—I concur.

K.N./R.K. *Appeal allowed.*

(9) [1905] 7 Bom. L. R. 306.

A. I. R. 1914 Lower Burma 156 (1)

HARTNOLL, OFFG. C. J. AND TWOMEY, J.

U Ga Zan—Appellant.

v.

Hari Pru—Respondent.

Civil Misc. Appeal No. 79 of 1913, Decided on 13th January 1914, against judgment and decree of Divn. Judge, Arakan, D/- 20th March 1913.

Contract Act (9 of 1872), S. 26—Agreement to repay large sum if boy marries second wife comes under S. 26 as it might prevent second marriage—S. 26 is not confined to restraint of first marriage only.

Where the fathers of a newly married couple at the time of marriage agreed between themselves that the girl's father would pay all necessary expenses for the education of the boy, and in case the boy, during the lifetime of his wife, married another woman, his father would repay all that might have been spent on his education by the father of his wife :

Held : that the agreement came within the meaning of S. 26 as the burden of reimbursing the considerable amount spent on the education of the boy would naturally exercise a restraining influence on him if he thought of marrying another woman.

There is nothing in S. 26 to restrict its operation to the case of first marriages only; it does apply to a person married already. [P 156 C 2]

Lambert—for Appellant.

McDonnell—for Respondent.

Hartnoll, Offg. C. J.—Hari Pru married his niece Mi Ah Win to appellant's son Tha Do Aung. Hari Pru says that when the marriage took place it was mutually agreed as follows :

"That the plaintiff would send the said Tha Do Aung either to Rangoon or Calcutta, whichever place he liked to go to, for education, and for this the plaintiff would pay all necessary expenses, and the defendant on his part promised to repay the plaintiff all the money that the plaintiff would spend on the education of his son, the said Tha Do Aung, if the latter in the lifetime of his wife, the said Mi Ah Win, married again any other woman."

The question to be decided in this appeal is whether, if there was such an agreement, it is not void under S. 26, Contract Act, as being an agreement in restraint of marriage.

Respondent's counsel argues that the section should not be held to apply to a person married already. I am unable to agree. When it was enacted, the legislature knew that polygamy was practised by certain races in India, and yet the section is perfectly general in its terms. There is nothing in it to restrain its operations to the case of first marriages only.

It was then urged that there is a difference between legal and moral restraint—that in the present case Tha Do Aung did not bind himself not to marry again, and that, if he did not marry another woman owing to the expense entailed on his father by virtue of this agreement, there would only be a vague restraint on account of paternal affection.

It seems to me that the agreement, if it was made, comes within the meaning of the section. The intention was clearly to burden Ma Tha Do Aung's father with considerable expense, if he married again during Mi Ah Win's lifetime, and this, if he was a dutiful son with a reasonable sense of the duty and the fitness of things, would naturally exercise a restraining influence on him if he thought of marrying another woman. Not only would his own sense of what was right restrain him, but his father and relations would have an extra motive for endeavouring to prevent any other marriage. It was in my opinion clearly an agreement in restraint of marriage.

I would allow the appeal, set aside the decree of the Divisional Court and dismiss the suit awarding appellant costs in all Courts.

Twomey, J.—I concur.

K.N./R.K. *Appeal allowed.*

A. I. R. 1914 Lower Burma 156 (2)

TWOMEY, J.

Emperor

v.

Po Thin—Accused.

Criminal Revn. No. 115-A of 1913, Decided on 4th June 1913.

(a) Criminal P. C. (5 of 1893), S. 383—Imprisonment in police lock-up.

It is illegal to sentence an accused person to suffer imprisonment in a police lock-up. [P 157 C 1]

(b) Prisons Act (9 of 1894), S. 3 (1)—Words "prison" and "jail" explained.

The terms "prison" and "jail" do not include any place for the confinement of prisoners who are exclusively in the custody of the police. [P 157 C 2]

Judgment.—In this case the accused was convicted of an offence under S. 309, I. P. C., and was sentenced to suffer seven days' simple imprisonment in the Lemyethna police lock-up. The Magis-

trate's order was illegal. He had no power to sentence the accused to suffer imprisonment in a police lockup. S. 383, Criminal P. C., directs that an accused sentenced to imprisonment 'shall be forwarded to a jail with a warrant. A jail is a prison within the meaning of the Prisons Act, 1894, and the Prisoners Act, 1900, but the terms "prison" and "jail" do "not include any place for the confinement of prisoners who are exclusively in the custody of the police": see S. 3 (1), Prisons Act, 1894. The Local Government could, of course direct under S. 541, Crimlnal P. C., that persons liable to be imprisoned may be confined in such a place; but the Local Government has not issued any such direction. The Magistrate should not have mentioned the place of confinement in his order at all, and the warrant should have been addressed to the Superintendent of the District Jail or other jail to which prisoners sentenced in Lemyethna are ordinarily committed.

K.N./R.K *Order accordingly.*

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* A. I. R. 1914 Lower Burma 157

HARTNOLL, OFFG. C. J., AND TWOMEY, J.

Maung Mya Gyi—Complainant.

v.

Mg. Po Shwe—Opposite Party.

Criminal Reference No. 2 of 1914, Decided on 8th April 1914, made by Parlett, J., D/- 29th January 1914.

(a) Contract—Construction—Hire and purchase—Nature of, explained—Hirer becomes owner when amount is paid—It is not sale within Contract Act, S. 78.

In a hire purchase agreement the hirer is under no legal obligation to buy but has an option either to return the article hired or to become its owner on payment in full, whereas the seller is bound to keep his offer open; it is not a sale within the meaning of S. 78, Contract Act, the hirer being merely a bailee. *Helby Maithews*, (1894) 2 *Q. B.* 262, *Foll.* [P 158 C 1, 2]

*** (b) Penal Code (45 of 1860), S. 408—Hirer selling article before paying in full commits criminal breach of trust.**

Where a hirer of a sewing machine without making payments in full sells the machine he is guilty of criminal breach of trust: [P 158 C 2]

Parlett, J.— The facts alleged in this case are that on 26th November 1912 respondent obtained possession of a sewing machine from the complainant, an agent of the Singer Manufacturing Co., upon payment of Rs. 15 down and executed an agreement to pay Rs. 10 per month every month in advance as rent so long as he retained the machine, on condition that when the payments so made by him aggregated to Rs. 120, the machine was to become his absolute property. He could however at any previous time terminate the agreement by returning the machine in good order; meanwhile until he so returned it or until he had completed payments to the amount of Rs. 120, he was not to sell or pledge the machine. He was to keep it in his own custody at a place named in the agreement and was not to remove it thence without the previous consent in writing of the company. On 5th January 1913 respondent paid Rs. 10, but it is alleged that he has never paid any more. On 1st May 1913 he sold the machine for Rs. 50 to Maung Kyaw Din and Ma Hnin Shwe to whose village it was removed. Respondent was prosecuted under S. 420, I. P. C., and discharged. It is now sought to have further inquiry made into the case against him on the ground that the facts alleged disclosed the offence of criminal breach of trust.

The Magistrate in discharging the respondent quoted long extracts from the judgment of this Court in *Musa Mia* v. *M. Dorabjee* (1) and based his order on the decision therein without however expressly referring to that ruling. The agreement in that case was substantially the same as that in the present case and it was held to be simply an agreement to sell and buy a sewing machine for a price named by a payment down and by monthly instalments afterwards. In that view I think it would be a contract for sale of ascertained goods where part of the price was paid and the goods were delivered. Accordingly the property in the goods would pass to the respondent under S. 78, Contract Act, and if he was also the beneficial owner of the goode he would not be guilty of criminal breach of trust, had he sold it. The decision was come to after a consideration of the Upper Burma case of *The Singer Manufacturing Co.* v. *Elahi Khan* (2) and the English case of *Helbi* v. *Matthews* (3). The Upper Burma case was decided very soon after the English case which is dated 9th May 1894. But a year later the English decision was reversed by the House of Lords: see

(1) [1910] 8 I. C. 969.
(2) [1892-96] 2 U. B. R. 291.
(3) [1894] 2 Q. B. 262=63 L. J. Q. B. 577.

Helby v. *Matthews* (4), which fact does not appear to have been brought to the notice of this Court at the hearing of the case referred to above. The agreement in *Helby* v. *Matthews* (3) appears to be essentially similar to that involved in the present case and had the interpretation put upon it by the House of Lords been before this Court I think it probable that a different finding as to the full meaning and effect of the agreement would have been come to. In *Gopal Tukaram* v. *Soorabji Nusserwanji* (5) the Bombay High Court held that a similar agreement was one for hire and did not become one for purchase until the specified conditions were fulfilled. Though served with notice, the respondent has not appeared or instructed counsel to argue the matter. In view of the importance of the question involved and of the decision of the Bombay High Court, I think the question of the meaning and effect of the agreement entered into in this case should be reconsidered by a Bench of this Court and I refer it accordingly.

Hartnoll, Offg. C. J.—The facts have been set out by Parlett, J., and it is unncessary to repeat them. The question is what is the true meaning of the contract entered into by the two parties. The contract entered into, viz., by Mg. Po Shwe, is not essentially different to that discussed in the case of *Helby* v. *Matthews* (4) and the same considerations that goverued the decision in that case must govern the decision in the present case. It was held in that case that upon the true construction of the agreement the hirer was under no legal obligation to buy, but had an option either to return the piano or to become its owner on payment in full. Lord Watson said: "In order to constitute an agreement for sale and purchase, there must be two parties who are mutually bound by it. From a legal point of view the appellant was in exactly the same position as if he had made an offer to sell on certain terms and had undertaken to keep it open for a definite period. Until acceptance by the person to whom the offer is made, there can be no contract to buy. So long as the agreement stood unaltered there could, in this case, be no contract to purchase by Brewster until he had complied with the terms of the option given him, and had duly made the thirty-six monthly payments which it prescribes as the condition of his becoming owner of the piano. . . . . Whilst, in popular language, the appellant's obligation might be described as an agreement to sell, it is in law nothing more than a binding offer to sell. There can, in such a case, be no agreement to buy, within the meaning of the Act of 1889, until the purchaser has exercised the option given him in terms of the agreement. So in the present case though there was a binding offer to sell by the Singer Manufacturing Co. through its agent, there was no agreement to buy by Mg. Po Shwe until he had exercised the option given him by the agreement. He could terminate the agreement before paying the Rs. 120 by instalments by returning the machine. The agreement being construed in this manner there was no agreement to buy and consequently no sale within the meaning of S. 78, Contract Act. The property in the machine therefore remained with the Company and the possession of Mg. Po Shwe was merely that of a bailee and he would be entrusted with the machine within the meaning of S. 405, I. P. C. The Magistrate in his order of discharge held that for the breach of the agreement the Company would only be entitled to damages in the civil Court.

In the case of *Musa Mia* v. *Dorabji* (1) the House of Lords' case was not brought to my notice, but only the case between the same parties as it was decided by the Court of appeal. The question in *Musa Mia* v. *Dorabji* (1) was the amount recoverable for breach of the contract.

I would direct the District Magistrate, Bassein, by himself or any of the Magistrates subordinate to him to make further inquiry into this case with the object of deciding whether Mg. Po Shwe is or is not guilty of an offence punishable under S. 406, I. P. C., and of punishing him for such offence if it be found that he has committed it.

Twomey, J.—I concur.

K.N /R.K. *Order accordingly.*

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(4) [1895] A. C. 471=60 J. P. 20=64 L. J. Q. B. 465=11 R. 232=72 L. T. 841=43 W. R. 561.

(5) [1904] 6 Bom. L. R. 871.

* A. I. R. 1914 Lower Burma 159

HARTNOLL, OFFG. C. J. AND TWOMEY, J.

Ma Aung Byu and *another* — Defendants—Appellants.

v.

Maung Thet Hnin — Plaintiff — Respondent.

First Appeal No. 6 of 1912, Decided on 6th April 1914.

*** (a) Buddhist Law (Burmese) — Divorce—Desertion will not be presumed by husband's going to jail—Mere desertion is not sufficient for divorce—Wife well provided during husband's absence in jail marrying another—Her conduct amounts to desertion and adultery.**

Under Buddhist law a man sentenced to imprisonment is not to be deemed to have deserted his wife; nor does desertion ipso facto and without any further and express act of volition on the part of either party dissolve the marriage tie.

Therefore the wife of a convict in possession of sufficient joint property to maintain herself and children is not entitled to take another husband to herself, but if she does so, her conduct amounts to desertion and adultery and the husband on return is entitled to treat the marriage tie as at an end and to demand all the property: 3 *L. B. R.* 175 (*F. B.*) and (1892) 2 *U. B. R.* 96, *Ref.* [P 159 C 2]

(b) Evidence—Note recorded by clerk in arbitration is inadmissible.

A note of evidence taken by a clerk in the course of abortive arbitration proceedings is not admissible in evidence. [P 160 C 2]

Hay—for Appellants.

Dantra—for Respondent.

Twomey, J. — The plaintiff-respondent, Maung Thet Hnin, was convicted of murder and sentenced to transportation for life in 1899; but in 1911 the remainder of his sentence was remitted and he was released. At the time of his conviction he left a wife, Ma Aung Byu, with four young children and the land and other joint property of the married couple was admittedly sufficient for the maintenance of Ma Aung Byu and the children. About three years after Thet Hnin's conviction Ma Aung Byu took another husband, Kyaw Zan Hla, with whom she has since lived. When Thet Hnin came back from transportation he demanded the joint property from Ma Aung Byu. She would agree only to give him a moiety of the joint property. There was a reference to arbitration, but nothing came out of it and Thet Hnin brought the present suit against Ma Aung Byu and Kyaw Zan Hla for the recovery of the property acquired during the marriage of Thet Hnin and Ma Aung Byu.

The plaintiff's case is that Ma Aung Byu had no right to take a second husband and that in doing so she was guilty of adultery and desertion. Ma Aung Byu, on the other hand, contends that she was entitled to take another husband when three years had elapsed from the time of Thet Hnin's conviction and that by taking a second husband she did not forfeit her share in the joint property.

There is no authority for holding that a man sentenced to imprisonment is thereby to be deemed to have deserted his wife. The Dhammathats do not provide for such contingency. But Ss. 242 to 249 and 393 of the Ex-Kinwum Mingyi's Digest deal with cases in which a husband goes on a journey or goes to war, and they show that the wife must wait indefinitely for her husband's return, at any rate as long as she has adequate means of subsistence from the joint estate. Having regard to the spirit of these rules I think it is clear that Ma Aung Byu had no right to take a second husband and I would accept the decision of the District Court that her conduct in doing so amounted to desertion and adultery. It has been held however that desertion does not ipso facto and without any further and express act of volition on the part of either party dissolve the marriage tie: *Thein Pe* v. *U Pet* (1). We have therefore to consider when the marriage tie was actually dissolved. Was it dissolved by the act of Ma Aung Byu in taking a second husband, or did it subsist until 1911 when Thet Hnin returned from transportation? The Upper Burma case, *Mam Thin* v. *Maung Kyuw Ya* (2), is good authority for the view that the deserting party cannot claim a divorce by pleading the desertion, and Sir Harvey Adamson expressed himself in favour of the same view in *Thein Pe* v. *U Pet* (1) though the point was not decided in that case. I would follow the interpretation adopted by the learned Judicial Commissioner, Upper Burma, and hold that the marriage tie between Thet Hnin and Ma Aung Byu was not dissolved by her action in deserting him, but subsisted until Thet Hnin was released from jail and demanded the joint property from Ma Aung Byu. By that express act he took his stand upon the fact of the desertion and

(1) [1905] 3 L. B. R. 175 (F. B.).
(2) [1892] 2 U. B. R. 96.

treated his marriage tie with Ma Aung Byu as severed.

It is admitted that in the case of a divorce on the ground of the wife's adultery the husband is entitled to all the property, and whereas in this case the husband treats the marriage as at an end on the ground of his wife's desertion and adultery there is no good reason to depart from the ordinary rule.

The District Court has decided that certain property to the value of Rs. 3,675 was in Ma Aung Byu's possession when she took Kyaw Zan Hla as her husband and a decree has been given against both the defendants-appellants for this property. As regards the Yindaw paddy land and the Payagon paddy land there is no dispute. The Kundaw garden land was admittedly bought in the interval between Thet Hnin's conviction and the second marriage, and it was rightly treated as part of the joint estate. The house built by Ma Aung Byu at Kundaw was built before the second marriage and that also was rightly included in the joint property. The moveable property decreed in Thet Hnin's favour consisted of:

	Rs.
2 tickals of gold valued ...	60
A cart	30
Cash	600
80 baskets of paddy ...	80
Debt paid by Ma To Le ...	500
Interest on this debt ...	150

As regards the gold, and the cart and the paddy I think the value of these may be set against the expeness incurred by Ma Aung Byu in maintaining herself and the children after the second marriage. It is true that they also had the produce of the lands belonging to Thet Hnin. But even if this produce is taken into the account, the aggregate amount available for maintenance was not excessive. I would therefore disallow these three items of Rs. 60 and 30 and Rs. 80.

Against the amount of cash, Rs. 600, which was admittedly in Ma Aung Byu's hands, should be set off the amounts which were given to the two eldest children when they were married. Po Chon received Rs. 150 and Ma Mya got jewellery to the value Rs. 130: total Rs. 280. The items Rs. 600 should therefore be reduced to Rs. 320. I cannot agree with the District Judge that the defendants should pay Rs. 500 plus Rs. 150 in respect of the transactions with Ma To Le. In dealing with this item the learned Judge has relied on Ma Aung Byu's alleged admissions in Ex. B, a note of evidence taken by a clerk in the course of the abortive arbitration proceedings. Ex. B was wrongly admitted in evidence. The proper course would have been to question Po Saw, the writer, P. W. 2, as to what Ma Aung Byu said at the time. Po Saw could then have refreshed his memory by referring to Ex. B under S. 159, Evidence Act. As the case stands, Ex. B must be excluded from consideration altogether. According to Ma Aung Byu's evidence she received interest at 30 per cent. per annum for two years on the loan of Rs 200 to Ma To Le. In the third year Ma To Le failed to pay interest and gave her land in usufructuary mortgage for Rs. 500, which sum presumably consisted of the original debt of Rs. 200 plus one year's interest, Rs. 60, plus cash Rs. 240; subsequently, a further sum of Rs. 300 was paid to Ma To Le who then sold the land outright to Ma Aung Byu and Kyaw Zan Hla. The second sum of Rs. 300, according to Ma Aung Byu, was obtained by the sale of the produce of her lands.

If it were proved that the additional advances paid to Ma To Le came out of the joint estate it would be reasonable to make Ma Aung Byu, who now has Ma To Le's land, refund the money to Thet Hnin. But there is no satisfactory proof on this point. Moreover Thet Hnin did not demand these amounts from Ma Aung Byu. He asked only for the original loan of Rs. 200. In the circumstances I would hold Ma Aung Byu responsible only for Rs. 200, the amount of the original loan to Ma To Le, and Rs. 60, the amount of interest which Ma To Le could not pay. Both these amounts were afterwards merged in the sum of Rs. 800, the price for which Ma Aung Byu took over the land from Ma To Le, and I think she should pay these sums aggregating Rs. 260 to Thet Hnin as part of the joint estate.

I would therefore modify the decree of the lower Court by awarding to the plaintiff as against both defendants:

		Rs.
Yindaw paddy land valued at		1,600
Payagon paddy land	...	400
Kundaw garden land valued at		95
Kundaw house	...	160
Cash Rs. 320 plus Rs. 260	...	580

together with costs on the aggregate amount, Rs. 2,835.

I see no sufficient reason to allow the defendants' costs on the difference between the amount decreed and the amount Rs. 5,595 at which the relief claimed was valued in the plaint. The court-fee payable on the plaint is Rs. 305 of which however only Rs. 170, the court-fee on the amount now decreed, is payable by the defendants. The difference must be paid by the plaintiff. The court-fees recoverable from the parties will be a first charge on the property decreed.

Hartnoll, Offg. C. J.—I concur.

K.N./R.K. *Decree modified.*

A. I. R. 1914 Lower Burma 161

HARTNOLL, OFFG. C. J., AND YOUNG, J.

Rangoon Electric Tramway and *Supply Co. Ltd.*—Applicant.

v.

Rangoon Municipality—Respondent.

Civil Ref. No. 1 of 1913, Decided on 11th August 1913, made by Judge of Small Cause Court, Rangoon, under S. 113, Civil. P. C.

Burma Municipal Act (3 of 1898), S. 46—Effect of machinery in valuation of premises explained though machinery itself is not taxable.

Machinery placed for use in a building is not liable as such to taxation under S. 46, but machinery, which is on the premises to be rated, and which is there for the purpose of making and which makes the premises fit as premises for the particular purpose for which they are used is, however, to be taken into account in ascertaining the rateable value of such premises. [P 163 C 1]

Giles and *Coltman*—for Applicant.

Lentaigne—for Respondent.

Hartnoll, Offg. C. J.—Two questions have been referred to us for decision under the provisions of S. 64 (5), Burma Municipal Act, 1898, namely (1) whether machinery placed for use in a building is liable as such to taxation under S. 46 (1) (A) (a), Municipal Act, and (2) if not, what is the principle to be applied in determining when, if at all, it is liable to taxation under the proviso. The reference has been rendered necessary as the Rangoon Municipal Committee in assessing the Rangoon Electric Tramway and Supply Co. has, in arriving at the gross assessable value, included in it a sum of Rs. 6,50,000 on account of machinery. From the order of the President of the Municipal Committee it would appear that the machinery assessed consists mainly of four turbo-generators and three boilers not built into the power house in such a way as not to be readily removeable, but merely bolted to the floor for the purpose of steadying them while in motion. S. 46 (1) (A) (a) contains the provision of law under which the tax on the company has been imposed. It permits a tax on buildings and lands not exceeding ten per cent. of the annual value of such buildings and lands. S. 46 (4) defines annual value and is as follows: "In this section, annual value means the gross annual rent for which buildings and lands liable to taxation may reasonably be expected to let, and in the case of houses may be expected to let unfurnished."

On the part of the Company it is contended that in their assessment the value of all machinery which is not so structurally incorporated into their buildings as to form part of them should be excluded; but on behalf of the Municipal Committee it is urged that the value of all the machinery should be taken into consideration in deciding the annual value. The Municipal Committee relies on the English cases concerning the liability of machinery to be rated; the company contends that such cases should not be taken into consideration at all as they are of a conflicting nature and are based on different statutes, that Burma has its own Act, and this Act alone should be considered in arriving at a decision. It was urged that there are two distinctions between the statute of 43 Eliz, Cl. 2, and the Burma Municipal Act. First, that the object of the Elizabethan statute was to relieve the poor, for which the standard would be wealth, whereas the object of the Municipal Act is to private roads, scavenging lighting and other amenities for the town, the standard for which is the extent to which these facilities are enjoyed by each person. Secondly, under the statute, overseers were employed to tax persons, whereas under the Act the Municipal Committee taxes property.

As regards the present state of the law in England I am unable to find that it is now in an unsettled condition. The case of the *Tyne Boiler Works Co.* v. *Overseers of the Parish of Longbenton* (1) laid down the rule as to how machinery was to be taken into account in ascertaining the rateable value of the premises and the principle laid down in that case was affirmed by the House of Lords in *Kirby* v *Hunslet Union Assessment Committee* (2). In that case Lord Halsbury said: "It is enough for me that a long series of decisions, for certainly half a century, have established the bald proposition, which is all I am insisting upon namely that although the machinery may not be part of the freehold, it yet is to be taken into account, and in saying that, I do not want to muffle it in a phrase, but what I mean by that is, that to increase the amount of the rate which is exacted from the tenant you may enter into that question and form a judgment upon it, although, as a matter of fact, the machinery may not be attached to the freehold."

With regard to the argument that in England it is the person who is taxed and in Burma the property, in the *Tyne Boiler Works Co.s'* case (1) all consideration of personal property was left out of account. Only the question of how the value of real property was to be arrived at for the purpose of rating it was considered. Lord Esher, M. R., said: "It is said with respect to some of the cases that they are not authorities, because of the provisions of the statute passed with regard to the rating of personal chattels. Difficulties had arisen with regard to the question how far personal chattels were to be taken into consideration in rating the inhabitants of a parish. Those difficulties were set at rest by the Statute 3 and 4 Vict., C. 89, but it had nothing to do with the question how the value of real property is to be arrived at for the purpose of rating it. Nobody says that these machines are to be rated as personal chattels. The question is whether they are to be taken into account in estimating the rateable value of the premises, which it is admitted are liable to be rated. The statute therefore makes no difference and all the cases with regard to estimating the value of real property remain untouched by it." No weight therefore can be attached in my opinion to such an argument in deciding the present case.

With regard to the argument that the objects of the English statute and the Burma Municipal Act are not the same, I am unable to see how the objects of the different laws affect the decision of this reference. One of the objects of the Municipal Act is to impose taxes, and moreover S. 72, Burma Municipal Act, shows that its objects are not so circumscribed as urged by counsel.

It was further argued that the word "buildings" used in S. 46, Municipal Act should be construed in its strict sense and should not be taken to mean anything that was not a structural part of the actual buildings, that the same meaning should be given to the word in S. 46 as in other sections of the Act, such as Ss. 89 to 92; and this seems to be the real point for decision in the reference. Should this contention prevail in interpreting S. 46 (4)? Or should the established English rule be followed? S. 46 (4) lays down how the "annual value" is to be determined and declares that it means the gross annual rent for which buildings and lands may reasonably be expected to let. It was the annual rent, gross or net, that was in issue in the English cases that dealt with the rateable value of machinery. In the *Tyne Boiler Works Co.'s* case (1) it is set out at p. 82 of the report that the mode in which the rateable value of the premises was arrived at was by ascertaining the gross estimated rental which a tenant from year to year might reasonably be expected to be willing to give for the use of them (inclusive of the machinery and plant) and by making the statutory deductions from such rental.

The Judges in the English cases relating to machinery were, therefore, engaged in deciding the same question as we are now being called on to decide. This being so, although we are not bound by the English cases, I fail to see how we can lightly set aside the arguments and the decisions of such Judges, who were and are of the greatest eminence, and no argument has been advanced to

(1) [1887] 18 Q. B. D, 81=56 L. J. M. C. 8=55 L. T. 825=35 W. R. 110=51 J. P. 420.
(2) [1906] A. C. 43=15 L. J. K. B. 129=94 L. T. 36=70 J. P. 50=4 L. G. R. 144=22 T. L. R. 167.

B. N. DAR, B. A. LL. B.
Vakil High Court,
Lower Burma 163
SRINAGAR (Kashmir

us which, in my opinion, would justify us in doing so.

To come to the actual questions themselves, it is not contended by the Municipal Committee that machinery placed for use in a building is liable as such to taxation, nor is this laid down by the English cases. I would therefore answer the first question in the negative. The second question I would answer in the words of Lord Esher, M. R., as used by him in the *Tyne Boiler Works Co.'s* case (1) as follows: "Machinery which is on the premises to be rated and which is there for the purpose of making and which makes the premises fit as premises for the particular purpose for which they are used, is to be taken into account in ascertaining the rateable value of such premises. Of course, it is not all things on the premises, or that are used on the premises, which are to be taken into account; but things which are there for the purpose of making, and which do make them fit as premises for the particular purposes for which they are used."

Young, J.—I concur.

K.N./R.K. *Reference answered.*

A. I. R. 1914 Lower Burma 163 (1)

TWOMEY, J.

Sein Yin—Applicant.

v.

Ah Moon Shoke—Opposite Party.

Criminal Revn. No. 165-B of 1913, Decided on 28th August 1913.

Workmen's Breach of Contract Act (13 of 1859), S. 1—S. 1 governs artificer who does not personally work but agrees to get work done under his supervision.

It is not necessary for a prosecution under the Act that an artificer should work with his own hands. S. 1 covers the case of a head artificer or workman who undertakes to get certain work done by other artfiicers, workmen or labourers under his own supervision and direction. [P 163 C 2]

Robertson—for Applicant.

Judgment.—This is a case under the Workmen's Breach of Contract Act, 1859. It appears from the agreements filed in the Magistrate's proceedings that the respondent Ah Moon Shoke received an advance from the petitioner Ma Sein Yin to build a house for her. It is alleged that when the house was only half finished the respondent refused to go on with the work. Ma Sein Yin admitted that Ah Moon Shoke "did not build himself" though she said he is a head carpenter. The Additional Magistrate dismissed the complaint holding that the respondent is not an "artificer, workman or labourer" within the meaning of the Act, because he took no part in the work himself. No authority is given for this decision. It is apparently incorrect to say that the respondent took no part in the work. Though he may not have handled any tools himself, he was presumably the supervisor and director of the manual labour engaged in building the house. It is not necessary for a prosecution under the Act that the artificer should work with his own hands. This is clear from S. 1 which expressly provides for cases where a head artificer or workman (such as Ah Moon Shoke appears to be) undertakes to get a certain work done by other artificers' workmen or labourers according to the terms of a contract. In the Madras ruling *Gilby* v. *Subbu Pillai* (1), the ordinary business of the accused was that of a contracting bricklayer and the contract which he was accused of breaking was a contract for earthwork. Subbu Pillai was not himself a workman at earthwork and it was held that he did not come under the Act. The case is clearly distinguishable from the present case in which the accused is a "carpenter contractor" or "head carpenter" under whose supervision and direction the house was to be built by journeymen carpenters. I think the case falls clearly within the scope of the Act.

The order of dismissal is set aside and it is ordered that the complaint shall be restored to the file of the Additional Magistrate, who should inquire into it and dispose of it under the Act.

K.N/.R.K. *Order set aside.*

(1) [1884] 7 Mad. 100=1 Weir 690.

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* A. I. R. 1914 Lower Burma 163 (2)

HARTNOLL, OFFG. C. J. AND ORMOND, J.

Zaw Ta—Accused.

v.

Emperor—Opposite Party.

Criminal Ref. No. 3 of 1914, Decided on 8th May 1914.

*** Criminal P. C. (5 of 1898), S. 488—Limit of sentence that can be passed on default stated—Where more than one month allowance remains unpaid even after warrant imprisonment exceeding one month cannot be awarded.**

When a Magistrate issues a warrant for arrears of maintenance for more than one month and when the allowance for more than one month remains unpaid after the execution

of the warrant, he is not competent to pass a sentence of imprisonment exceeding one month. The words in sub-S. 3 " for the whole or any part of each month's allowance remaining unpaid " may mean " for the whole or any part of every month's or all months' allowance remaining unpaid " where the arrears remaining unpaid are for a period exceeding a month; 9 *All.* 240 and *P. J. L. B.* 316, *Foll.*; 20 *Mad.* 3 and 25 *Cal.* 291, *Diss. from.* [P 165 C 1, P 166 C 1]

Order of Reference

On 2nd April 1912 Nga Zaw Ta was ordered to pay Nan Ma Yin Rs. 5 a month as maintenance for her child. Nothing was paid up to 30th August 1912 when she applied to enforce the order and on 20th September arrears for five months were recovered. Nothing further was paid before 29th April 1913 when she again applied to enforce payment of arrears for seven months. Nga Zaw Ta's attendance before the Magistrate was not procured till 27th November and orders were not passed till 11th December when he was sentenced to one year's rigorous imprisonment for neglecting to pay arrears of maintenance for 13 months. On 17th January 1914 the Sessions Judge directed Nga Zaw Ta to be released and has referred the case for orders as he considers the Magistrate's order bad on the ground, among others, that on the authority of *Ma Me Ma* v. *Mra Tha Tun* (1) if a warrant is issued for an accumulation of arrears for several months the Magistrate has no power to give a greater sentence than if the warrant related to only one breach. That ruling followed the Allahabad case of *Queen-Empress* v. *Narain* (2), which was however dissented from by the Madras High Court in *Allapichai Ravuthar* v. *Mohidin Bibi* (3). Though the point was not actually decided in *Maung Po* v. *Ma Myit* (4) the learned Judicial Commissioner of Upper Burma there indicated that he held the opinion that the law provides for the levy of arrears which may be for several months with the consequential penalty, in the event of their not being realized, of imprisonment for several months. In view of the divergent views of the High Courts on the point I think it desirable that the matter should be reconsidered by this Court, and accordingly refer to a Bench the question whether when a Magistrate issues a warrant for arrears of maintenance for more than one month and when the allowance for more than one month remains unpaid after execution of the warrant, he is competent to pass a sentence of imprisonment exceeding one month.

Ormond, J.—The maximum sentence which may be imposed on any one occasion under S. 488, Criminal P. C., is, in my opinion one month. One warrant should only be issued for levying the amount of arrears due at the time of application for the warrant. The section means I think that for the successive defaults under one order for monthly payments of maintenance the defaulter, if able to pay, may on successive occasions be sentenced to imprisonment for a term not exceeding one month, whenever a warrant is applied for and is issued and the arrears then due are not realized, whether the amount remaining unpaid on each occasion is as much as one month's maintenance or not.

The defaulter could be imprisoned for one month although only a portion of a month's allowances remained unpaid under one warrant and he could be imprisoned again for one month under a subsequent warrant although a portion only of another month's allowance remained unpaid. But there is nothing to show that more than one warrant should issue on one occasion for the recovery of several months' arrears. On the contrary, " the Magistrate for every breach of the order may issue a warrant for levying the amount due; " i. e. the Magistrate may issue one warrant for levying the amount due under the order, to the applicant at the time of the application. This section seems to contemplate application being made for a warrant upon each occasion of default without delay. so that not more than one month's maintenance would be in arrear, though the applicant is not debarred from applying for a warrant for the recovery of the arrears up to date. I can find nothing to support the conclusion that the section authorizes one month's imprisonment for every month's arrears when one warrant is issued for the recovery of several months, arrears. To arrive at such conclusion the words " for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant " must be read as if they were, for

(1) P. J. L. B. 316.
(2) [1887] 9 All. 240=(1887) A. W. N. 54.
(3) [1897] 20 Mad. 3=2 Weir 638.
(4) [1902-03] 1 U. B. R. 3

each whole month's allowance remaining unpaid after the execution of the warrant and not " for any part of a (not each) month's allowance remaining unpaid." It should then be said that the words " for each month's allowance " contemplated a case where the amount remaining unpaid is equivalent to several month's allowance and show that in such a case a proportionate sentence of imprisonment exceeding one month may be imposed. If the words are read as being " for each whole month's allowance and for any part of each month's allowance remaining unpaid after the execution of the warrant, " the words " any part of each month's allowance " should show that if the words of the section referred to the case of several whole month's allowance remaining unpaid after the execution of the warrant they must also refer to the case where portions of several months' allowance remaining unpaid after the execution of the warrant, which could not be, for the warrant is issued to recover the amount due. Though the amount remaining unpaid might very well represent several whole months' allowance, the balance left over unpaid could not be more than one portion of a month's allowance, I read the above passage as meaning "for the whole amount or any part of a month's allowance remaining unpaid on each accasion after the execution of the warrant."

Under S. 316 of the Code of 1861 the maximum sentence on each occasion after the issuing of a warrant was one month's imprisonment ; and there is no indication in S. 488 of the present Code that the maximum sentence was intended to be increased beyond expressly allowing one month's imprisonment if the amount remaining unpaid is less than a whole month's allowance.

Hartnoll, Offg. C. J.—The question referred to us relates to S. 488, (3), Criminal P. C., and is "whether when a Magistrate issues a warrant for arrears of maintenance for more than one month and when the allowance for more than one month remains unpaid after execution of the warrant, he is competent to pass a sentence of imprisonment exceeding one month." The subsection is as follows : " If any person so ordered wilfully neglects to comply with the orders any such Magistrate may for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made. " Then follows a proviso, which it is not necessary to set out. The part of the subsection I have set out agrees with the corresponding subsection of the Code of Criminal Procedure, Act 10 of 1882, which preceded the Code now in force, except that the words "or until payment if sooner made" are new.

The meaning of the words in the subsection of Act 10 of 1862 has been considered in the following cases: *Queen-Empress* v. *Narain* (2), *Allapichai Ravuthar* v. *Mohiden Bibi* (3), *Bhiku Khan* v. *Zahuran* (5), *Ma Me Ma* v. *Mra Tha Tun* (1) and *Maung Po* v. *Ma Myit* (4). The Allahabad Court found that where a claim for accumulated arrears of maintenance for several months arising under several breaches of an order for maintenance is dealt with in one proceeding and arrears levied under a single warrant, the Magistrate acting under S. 488 has no power to pass a heavier sentence in default than one month's imprisonment as if the warrant related to a single breach of the order. This view was followed in the Burma case of *Ma Me Ma* v. *Mra Tha Tun* (1) ; but it was dissented from in the Madras and Calcutta cases which I have quoted. In the Madras case it was held that the imprisonment provided by S. 488 in default of payment of maintenance is not limited to one month and that the maximum imprisonment that can be imposed is one month for each month's arrears and if there is a balance representing the arrears for a portion of a month, a further term of a month's imprisonment may be imposed for such arrears. In this case an earlier case of Madras High Court was considered and it was pointed out that the wording of the Criminal Procedure Code which was in force when it was decided (Act 25 of 1861) in the section of it corresponding to S. 488 of Act 10 of 1882 differed from the wording of the latter section. As I have remarked the Calcutta case follows the Madras case. The Upper

(5) [1898] 25 Cal. 291.

Burma case does not seem to be one in which any definite conclusion was arrived at.

My own view is that the meaning of the words of the section is not too clear; at first I was inclined to hold the view taken by the Madras and Calcutta High Courts, as the words, "may sentence such person for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant to imprisonment for a term which may extend to one month" at first sight would seem to mean that a month's imprisonment can be inflicted in respect of each month's arrear remaining unpaid or in respect of any portion of a month's arrear remaining unpaid. But I can see that another view can be taken as to the meaning of the words. Looking at the meaning of the word "each" I see that the Century Dictionary gives it as "each every one, any one, being either or any suit of a numerical aggregate consisting of two or more, indefinitely." Without saying that each had a plural meaning it clearly when used in a sentence may refer to more than one.

For instance when we say "each part of the engine is in order '. this is equivalent to saying: "All parts of the engine are in order." The words in the subsection "for the whole or any part of each month's allowance remaining unpaid" may therefore be read as meaning possibly for the whole or any part of every months' or all month's, allowance remaining unpaid where the arrears remaining unpaid are for a period exceeding a month. Reading the words in this way it may be that the legislature intended that the term of imprisonment to be awarded should extend to a period of one month only in respect of all arrears due after the execution of the warrant, whether they amount to several months' allowance remaining unpaid or to a portion of a single month's allowance remaining unpaid. As I consider the words doubtful and not clear the benefit of the doubt must be given in favour of the subject and I would answer the question as follows:

"When a Magistrate issues a warrant for arrears of maintenance for more than one month, and when the allowance for more than one month remains unpaid after the execution of the warrant, he is not competent to pass a sentence of imprisonment exceeding one month."

K.N/R.K. *Reference answered.*

A. I. R. 1914 Lower Burma 166

ROBINSON, J.

Abdul Sattar—Plaintiff—Appellant.

v.

Maung Lu Maung and *another*—Defendants—Respondents.

Second Civil Appeal No. 227 of 1912, Decided on 4th February 1914.

(a) Civil P. C. (5 of 1908), S. 100—Mixed question of law and fact cannot be gone into in second appeal unlike Lower Burma Courts Act, S. 30.

Questions of fact which can be gone into in second appeals under S. 30, Lower Burma Courts Act, cannot be opened up in second appeals under S. 100, Civil P. C., unless the lower appellate Court made a new case for the parties which was not warranted by the pleadings and the evidence. [P 168 C 1]

(b) Civil P. C. (5 of 1908), Ss. 100 and 101—Question of contest between verbal sale and registered sale cannot be raised in second appeal.

The question of contest between a verbal sale and a registered sale deed is a mixed question of fact and law and cannot be allowed to be raised in second appeal under Ss. 100 and 101, for the first time. [P 168 C 1]

(c) Transfer of Property Act, S. 54—Agreement to sell subsequently carried out is loosely spoken as sale.

It is a common experience that witnesses do loosely speak of agreements to sell, subsequently carried out as if they were sales: 29 *Bom.* 1 (*P. C.*), *Cons.* [P 168 C 1]

Vertannes—for Appellant.

P. D. Patel—for Respondents.

Judgment.—Mr. Vertannes in this case has opened at some length on the facts and history of the litigation leading up to the present suit.

One Hussain Ali alias Ko Shwe Maung died intestate in 1899. His heir was his brother, Safer Ali, who is said to have been absent in Chittagong at the time of his death. It is alleged that there was a scramble for the estate which was taken possession of by various persons who combined to defeat the claims of the real heir. One Ko Lu Maung, defendant 1, and his son, defendant 2, are now in possession of the land sued for. Plaintiff alleges that he entered into an agreement with Safar Ali to whom letters of administration had been granted by which it was agreed between them that plaintiff should bring a suit against the defendants and obtain possession of the land for which he was to pay Rs. 700 minus

such expenses as he may have to incur on the litigation and on the same day a registered deed of sale was executed, the price being fixed at Rs. 700. Plaintiff brought the suit. Defendants alleged that defendant 1 had purchased this land from Safar Ali two or three months after Ko Shwe Maung's death; that there had been an agreement to buy and sell with Ko Shwe Maung prior to his death and that the sale was carried through after his death in pursuance of that agreement.

In the Court of first instance seven issues were drawn; the first was:

Was there sale of the land in suit to the plaintiff by Safar Ali as administrator of the estate of Ko Shwe Maung?

(2) If so, was the sale collusive?

The Court of first instance found against plaintiff on these two issues and dismissed his suit holding that it was unnecessary to decide any of the remaining issues. On appeal the Divisional Judge decided these issues in favour of the plaintiff and remanded the case for a decision on the remaining issues. They were these:

(3) Was there a sale to defendant 1 by Safer Ali as alleged in para. 3 of the written statement?

(4) If so, is that sale valid?

(5) Are the defendants in adverse possession of the land in suit as alleged in para. 6 of their written statement?

(6) If so, is plaintiff entitled to possession?

(7) To what relief, if any, is plaintiff entitled? It will be seen that issues 3 and 4 are practically one, and so are issues 5 and 6. The Court of first instance found all these issues in favour of the defendants. On appeal the Divisional Judge concurred and by both Courts plaintiff's suit was dismissed.

The present suit is a second appeal under Ss. 100 and 101, Civil P. C. Mr. Vertannes before concluding his opening urged that he also appealed under S. 30, Lower Burma Courts Act, and argued that he was entitled to open up questions of fact. He subsequently admitted that he could not base his prayer on S. 30 and this appeal was under the Civil Procedure Code only, but he urged that there had been a substantial error of fact in the procedure of the lower appellate Court such as would justify this Court in going into the question of fact relative to the decision of the issue as to whether the land had been sold to defendant 1,

In the course of the previous litigation there had been a suit by plaintiff against certain persons who were in possession of certain other plots of land and it is alleged that in that suit the defence had been that Ko Shwe Maung at the time of his death owned no property whatever, having parted with all either by gift or by sale. Defendant 1 as a witness in that case put forward to support the plea that Ko Shwe Maung died without any property. In the course of his evidence in that case he made certain statements with reference to the land that forms the subject of the present suit. In the present suit his evidence is that he purchased the land two or three months after Ko Shwe Maung's death from Safar Ali in the former suit he had stated that he had purchased the land two months before Ko Shwe Maung's death. He was cross-examined as to these different statements and he stated that he did not remember making these statements in the previous case, that he had stated that Ko Shwe Maung had said he would spend the purchase price on a mosque and a tank, and that his present statement of fact was correct. With reference to this evidence the learned Divisional Judge in his judgment said: "I agree with he lower Court that, since the sale was not an issue in Civil Revision No. 137 of 1907, the witnesses were not closely questioned about what was an irrelevant matter, and Lu Maung's statement is not irreconcilable with what he now has stated." It is urged that the lower appellate Court did not take into consideration the fact that the previous statement was made with a deliberate purpose of supporting the plea in that case that Ko Shwe Maung had parted with all his property prior to his death; that the statement that he made then was therefore deliberate and that it is flatly contradicted by the statement that he made in this suit. What both the lower Courts in this case have held with regard to this prior statement of defendant 1 is, I think clearly that the agreement to sell was made before Ko Shwe Maung's death and was loosely referred to by the witnesses in the for-

mer case as if it had been an actual sale. It is common experience that witnesses do loosely speak of agreements to sell subsequently carried out as if they were sales and I see no reason to think that the lower appellate Court did not consider the alleged contradiction and come to a finding on it in order to weigh the value of the evidence of Lu Maung in the present case and the truth of the plea that he was previous purchaser for value. It has been put to me the decision of their Lordships of the Privy Council in the case of *Shivabasava* v. *Sangappa* (1), which shows that the Court has on second appeal authority to go into questions of fact, such as this where the lower Court has failed to appreciate the essence of the argument. What their Lordships decided in that case was that where the lower appellate Court has made a new case for the parties and not warranted by the pleadings and evidence, the High Court had jurisdiction to interfere: as they had also if the decision is arrived at without any evidence to support the finding. I am unable to see that this ruling applies to the present case in any way. There was no question here of the Court setting up a different case from defendant 1 that he had set up himself. It was merely a question of weighing evidence and I am satisfied that the decision arrived at was sound and one in which I see no reason to differ. I must hold therefore that this Court has no power on second appeal to go into questions of fact on which there have been concurrent findings in both lower Courts and I cannot therefore go into the question now as to whether or not defendant 1 had purchased this land in suit as he alleged.

It remains to consider the remaining grounds of appeal that have been put forward. The grounds of appeal which are put forward in this case are based on a contest between the verbal sale to defendant 1 and the registered deed of sale to the plaintiff. The first three grounds all refer to this. This was a point which was not taken in the pleadings or in the grounds of appeal. It is a point which involves a decision of questions of fact, viz., as to whether plaintiff had notice of the prior sale to defendant. It would not be right to decide this question without defendant having an opportunity of producing evidence on the question of notice. It is a mixed question of fact and law and it cannot therefore be allowed to be raised in second appeal. The fifth ground of appeal also refers to this question of notice and the fourth me rely puts it in another form. The sixth ground was a grcund which was abandoned before the lower appellate Court and is not urged now. The finding therefore that the land was sold to defendant 1 and that the sale to him was valid must stand and I dismiss this appeal with costs.

K.N./R.K. *Appeal dismissed.*

(1) [1905] 29 Bom. 1=31 I. A. .154=6 Bom. L. R. 770=8 C. W. N. 865=1 A. L. J. 367 (P.C.).

A. I. R. 1914 Lower Burma 168

TWOMEY, J.

Sana Eman Saib —Applicant.

v.

Mooma Ena Mahomed Meera Saib and *others*—Respondents.

Civil Revn. Petns. Nos. 147 and 148 of 1911, Decided on 26th May 1913.

Paper Currency Act (2 of 1910), S. 26—S. 26 does not extend to endorsement.

It is not an infringement of the Paper Currency Act, to indorse a promissory note in blank. The prohibition contained in S. 26 of the Act does not extend to indorsements in blank.

A promissory note, payable to a specified person or order, does not, by an indorsement in blank become a "promissory note payable to bearer on demand": 8 *I.C.* 962 and 16 *Bom.* 689, *Ref.* [P 169 C 1]

Brown—for Applicant.

M. Auzam—for Respondents.

Judgment. — In these cases, Civil Revision Cases Nos. 147 and 148 of 1911, the only question for decision is whether it is an infringement of the Indian Paper Currency Act to indorse a promissory note in blank. The District Court of Amherst has held in Suit No. 164 of 1910 that a person who gets a promissory note payable on demand to himself or order and indorses it in blank makes out a promissory note payable to bearer on demand A person who makes a promissory note payable to bearer on demand infringes the provisions of S. 26, Paper Currency Act 1910 (corresponding to S. 24, Paper Currency Act, 1905) The learned Judge following the ruling in *Maung Po Tha*

v. *L. D'Attaides* (1), held that the promissory notes sued upon in the present cases embodied contracts forbidden by law and consequently that the plaintiff could not recover on them. The judgment of the learned Judge was passed in a case in the District Court, in which the same question arose, but it was made applicable to the cases now under revision, which are two Small Cause Court cases between the same parties as in the District Court case.

I can find no authority for the learned Judge's view that the plaintiff by indorsing the notes in blank "made" promissory notes payable to bearer on demand. It appears to me that when a promissory note is drawn up, signed and delivered to the payee, it is "made" once and for all, and a subsequent indorsement is no party of the "making." If the legislature intended to prohibit indorsements in blank, it may be presumed that the intention would have been clearly expressed in the section of the Paper Currency Act referred to above. The District Judge, in support of his view, quotes S. 8 (3), English Bills of Exchange Act (1882), which defines a bill payable to bearer so as to include a bill on which the only or the last indorsement is in blank. Before that Act was passed, a bill payable to bearer did not include a bill indorsed in blank. It required an express provision of law to bring about this change, in England and I think that an express provision of law would be necessary for the same purpose in India. The Bombay case, *Jetha Parkha* v. *Ramchandra Vithoba* (2) is also relied upon. Farran, J., in that case gave it as his opinion that the section of the Indian Paper Currency Act embraces not only a promissory note which is expressed to be but also one which in legal effect is payable to bearer on demand. I think the learned Judge was only contemplating cases in which the wording of the promissory note departs from common usage. In such cases the document as drawn or made has to be construed and its legal effect determined There is nothing in the Bombay case to suggest that the prohibition in S. 26, Currency Act extends to indorsements in blank.

I therefore decide that the construction which the District Court has put upon the section is incorrect.

K.N./R.K. *Appeal dismissed.*

(1) [1910] 5 L. B. R. 191=8 I. C. 962.
(2) [1892] 16 Bom. 689.

A. I. R. 1914 Lower Burma 169

HARTNOLL, OFFG. C. J. AND TWOMEY, J.

Mahomed Salay Naikwara—Appellant.

v.

Mulla Goolam Mahomed and *others*—Respondents.

Civil Misc. Appeal No. 6 of 1913, Decided on 23rd February 1914.

Civil P. C. (5 of 1908), S. 92—Scope of—Suit against trustees under S. 92 compromised—Old trustees discharged without taking accounts and new trustees appointed—Beneficiaries' suit, for setting aside decree discharging old trustees on ground of collusion, involving taking of accounts falls under S. 92 and is not tenable without sanction.

A suit, under the provisions of S. 92, Civil P. C., praying for the removal of trustees, appointment of new trustees, accounts and inquiries, etc., was compromised, the old trustees were discharged from their trusteeship, and new trustees were appointed in their stead. The beneficiaries under the trust being dissatisfied with the compromise decree attacked it in a regular suit on the ground of fraud and collusion and asked that so much of the decree as related to the discharge of the old trustees from their liability to render accounts of the trust moneys was void and of no effect:

Held: that, although the direct object of the suit of beneficiaries is to declare a portion of the challenged compromise decree void and of no effect, yet, as the grounds on which such a declaration is asked allege a breach of trust and involve the taking of accounts and inquiries before a decision can be given on the prayer for relief, the relief asked for should be held to come within Cl. (b), sub-S. (1), S. 92, Civil P. C., and therefore the suit was not maintainable without obtaining the consent of the Advocate-General: 2 *I. C.* 701, *Ref.* [P 171 C 1]

Doctor—for Appellant

Chari and *Vertannes*—for Respondents.

Hartnoll, Offg. C. J.—The point for decision in this appeal is whether the consent in writing of the Government Advocate was necessary for the institution of the suit out of which this appeal arises. In Civil Regular No. 417 of 1909, respondents 4 and 7 brought a suit against appellant and Mynuddin Naikwara that clearly came within the provisions of S. 92, Civil P. C. One Mariam Bi Bi alias Ma Htay by her will gave one-third part of her property after payment of her debts and funeral expenses to charitable purposes. It was alleged that appellant, who had been the agent and attorney of the deceased Mariam Bi Bi, had been in possession of her property, had obtained probate of the

will and had continued to remain in possession of the property. It was asserted that he had appropriated certain immovable properties belonging to the estate for the said charitable trust and had been managing the trust properties and realizing the rents and profits thereof and had not divided the same. Mynuddin Naikwara was made a defendant, as appellant alleged that he had appointed him to be a co-trustee, though the plaintiffs were not aware whether he had taken any part in the management of the said trust. It was asked that the defendants be called on to render an account, and that appellant should be removed from the office of trustee, other trustees being appointed and the trust estate being vested in them and that a scheme be framed for the management of the trust. This suit was compromised. The defendants were discharged from their trusteeship and respondents 4, 5 and 8 were appointed trustees in their stead. The first two respondents then instituted the present suit. They charge that the terms contained in the petition of compromise are collusive and fraudulent, inasmuch as the said compromise was made not for the benefit of the trust but for the purpose of concealing from the vigilance of the Court breaches of trust and fraud, committed by the appellant and Mynuddin Naikwara as trustees and that therefore the decree passed on the petition is ipso facto void against the plaintiffs who were beneficiaries under the said trust. Particulars of the alleged frauds were set out. They therefore asked that so much of the decree as related to the discharge of the appellant and Mynuddin Naikwara from their liability to render accounts for all the moneys received by them since the trust properties came into their hands as trustees thereof, is void and of no effect. The learned Judge on the original side disallowed the objection that the suit was not maintainable on the ground that the leave of the Government Advocate had not been obtained under S. 92 of the Code. He found that the relief asked for did not come within any of the reliefs specified in S. 92. He accordingly ordered that the matter be referred to the Second Deputy Registrar to investigate the accounts and report whether there was any justification for the charge of fraud being made.

The present S. 92 of theCode has considerable differences as compared with the corresponding S. 539 of the repealed Code (Act 14 of 1882 as amended). There were five reliefs in the old Code and and then came the words "or granting such further or other relief as the nature of the. case may require." The new section has eight reliefs, the last one "granting such further or other relief as the nature of the case may require" being made clearly a distinct form of relief as it is given a letter of the alphabet of its own. It is urged that "further or other relief" means relief ejusdem generis as the preceding reliefs. The word "other" is of wide import. As I have said, this form of relief has now been made clearly quite a separate form of relief.

The principle underlying the section is that private persons shall not have unrestricted license to bring suit against trustees of trusts created for public purposes of a charitable and religious nature, but they must obtain the sanction of a Crown officer first.

The duty is obviously imposed on such on officer of seeing that a prima facie cause exists for bringing such a suit before he gives his consent. The present suit in any case involves the taking of an account and inquiries into the accounts. This is the fourth form of relief set out in the section. In discussing the meaning of the words "further or other relief" Beaman, J., said in the case of *Sir Dinshaw M. Petit* v. *Sir Jamsetji Jijibhai* (1). "It will, of course be at once observed that that section, (i. e., S. 539 of the repealed Code) after an introduction containing very general words—as, e. g., 'whenever the direction of the Court is deemed necessary for the administration of any such trust,—goes on to say that the plaintiffs may obtain a decree for five specified objects, after which come the words 'or granting such further or other relief'. And it is, I understand, the opinion of my learned brother that the relief we are now concerned with does not fall within any of those five objects and cannot be included under the following words Those, it is said, must be read as ejusdem generis. I am not myself—and never have been—much in love with the ejusdem generis rule. It is too vague. If it

(1) [1909] 33 Bom. 509=2 I. C. 701.

means anything more than a tautologous reaffirmation of what has gone before, it must mean so very much more. What is relief of the like kind? Certainly not of a kind so like as to be practically identical. That would make the words mere surplusage. I should be disposed to think they meant such further or other relief as from the nature of the introductory words and the exemplifica-tory cases, appears to the Court to be appropriate in a suit of this kind. As, for example, removing fraudulent trustees, restraining a breach of the trust, and so forth.

In the present case the direct object of the suit is to declare a portion of a decree void and of no effect, but the grounds on which such a declaration is asked allege a breach of trust and they involve the taking of accounts and inquiries before a decision can be given on the prayer for relief, I am of opinion that the relief asked for should be held to come within the eighth ground of relief set out in S. 92. I would therefore allow the appeal, set aside the order of the learned Judge on the original side and dismiss the suit. It will be open to respondents 1 and 2 to obtain the leave of the Government Advocate, and if they obtain it, to file a fresh suit.

In view of the petition respondents 1 and 2 of 18th November 1912 and the order of the learned Judge on the original side passed on 26th November 1912, each party will bear its own costs on appeal.

Twomey, J.—I concur.

K.N./R.K. *Appeal allowed.*

A. I. R. 1914 Lower Burma 171

HARTNOLL, OFFG. C. J., AND TWOMEY, J.

Matilda Hindle —Appellant.

v.

Richard James Hindle—Respondent.

First Appeal No. 168 of 1913, Decided on 24th June 1914.

Husband and Wife—Divorce— Adultery is sufficient not to grant divorce but separation —Single assault when provoked is not cruelty —Assault though condoned would however amount to cruelty when accompanied by adultery— Venereal disease not contracted from wife is proof of adultery.

Mere adultery is not sufficient to grant a decree for dissolution of marriage but it is sufficient to grant a decree for judicial separation. One act of assault, especially when there was provocation for it, is not sufficient to prove legal cruelty. The offence of assault, though condoned, may subsequently revive when adultery is proved.

Adultery was held to be sufficiently proved where the husband had contracted gonorrhoea and did not allege that he had contracted the disease from his wife or any other source: *Gleen* v. *Gleen*, (1901) 17 *T. L. R.* 62, *Rel. on*; *Palmer* v. *Palmer*, (1860) 29 *L. J. M.* 124; *Blandford* v. *Blandford*, (1883) 8 *P. D.* 19; and *Moore* v. *Moore*, (1892) *P.* 382, *Ref.*

[P 173 C 1]

Coltman —for Appellant.

Hartnoll, Offg. C. J.—The appellant filed a petition praying for a decree for the dissolution of her marriage with the respondent on grounds of adultery and cruelty. In the alternative she asked for a decree for judicial separation. Respondent in his answer denied the charges made against him and charged his wife with committing adultery with one Brunsden, an Inspector of Police. He therefore asked that the petition against him be dismissed and that he be granted a decree for dissolution of marriage. The learned Judge on the original side ordered that each petition stand dismissed. Appellant has appealed against this order and the appeal has been heard ex parte.

The parties were married in 1904 and in 1910 came to live at Syriam, respondent taking employment in the Burma Oil Company. Brunsden, when the Hindles were at Syriam, was the Inspector in charge of the police station at the Burma Oil Company's works. The acts of adultery alleged are said to have occurred in May 1912 and on or about 23rd November 1912. Respondent is also alleged to have committed adultery in or about November 1912 and contracted venereal disease. The learned Judge on the original side has found the acts of adultery alleged to have been committed with the woman mentioned by name in the plaint not proved, but at the same time he has found that respondent was suffering from venereal disease in December 1912. He has however held that this latter fact is not sufficient to show that respondent was guilty of adultery.

The first ground of appeal deals with the adultery said to have been committed in May 1912, but at the hearing of the appeal this ground was abandoned. The second ground of appeal deals with the adultery alleged to have been committed on 23rd November 1912 with Ma Hla or some other prostitutes at a

brothel kept by one Ma Mya. The evidence to prove that act of adultery consists of the evidence of Jangaya, respondent's mali, who says that he took his master to the brothel, of the evidence of Brunsden and Johns, who say that they followed Hindle and saw him go into the brothel, of Kader Mira and Jangaya, who deposed to the subsequent sale and purchase of a syringe, Jangaya saying that it was for his master, and of the evidence showing that respondent contracted venereal desease and had it on him in December. Now there is evidence that petitioner and Brunsden have been on familiar terms. There is no good reason to disbelieve the witnesses Palmer and Quick when they say that on 17th December 1912 Brunsden had his arm round petitioner's waist when they were on the way to church. The witnesses had been attending a christening which took place before the service and as they left the church they saw the incident. Again Brunsden has been taking a prominent part throughout, according to him, the matrimonial differences of petitioner and respondent. He was the one who accompanied petitioner to the kallys in May 1912 after she was assaulted. He brought her clothes and so on. As regards the book "Her Point of View" it is not, in my opinion, proved that certain of the marginal notes are in Brunsden's handwriting, but it seems to one very improbable that they are. Petitioner allows that the book was sent her by Brunsden and that she read it, and she will not state that the notes were not there when she read it. She says she does not remember whether they were there or not. At the same time respondent may have caused them to be written, as for reasons to be given I do not consider him a trustworthy man.

There is also the gravest suspicion that the diary said to be written by Mrs. Hindle and given by Brunsden to her lawyers has been manufactured for the purposes of this case. I need only refer to the entry where Mrs. Brunsden's name is referred to. She was dead on the date stated. The letters, Exs. 1 and 2, show that petitioner is not above carrying on with another man, whom she allows to be married. When therefore Brunsden says that he followed Hindle and saw him enter a brothel, I am unable to rely on his testimony. Johns is a great friend of his, and I do not trust his testimony. I think their story is improbable when they say that they followed Hindle and his mali on a moonlight night. If so, how is that Hindle did not see them, especially as it may be presumed that he would in the circumstances be on the look-out so as to see that he was not observed. Then as regards the mali it may be that he may be telling the truth, but I cannot rely on his testimony for the reasons given by the learned Judge on the original side. The evidence as to the purchase of the syringe is also contradictory. I cannot therefore take as proved the specific incident pleaded in para. 5 of the plaint. At the same time I can see no reason to disbelieve the evidence that respondent was suffering from gonorrhoea in December 1912.

There is evidence that his clothes had stains containing the germs of that desease and I believe it. I do not consider petitioner is lying in her evidence in connexion with this incident. It is in the highest degree improbable that petitioner and Brunsden would manufacture such evidence and respondent give no reason why petitioner left him on 16th December. There must have been a reason and in the ordinary course he would know it. The letter, Ex. 5, which petitioner left assumes that he knew the reason of her leaving and also assumes that it was a reason that would give a right to a divorce. Respondent's letter to the petitioner of 29th December also shows that he knew the reason. He asks her to forgive and forget. Holding therefore as I do that Hindle was suffering from gonorrhoea in December 1912, I am unable to consider that this is not sufficient to prove adultery. In the case of *Gleen* v. *Gleen* (1), it was held that adultery was sufficiently proved by showing that the respondent was admitted to hospital suffering from a certain illness. The parties had been married since 1904 and respondent does not allege that he contracted the disease from his wife or any other source. He contents himself with a flat denial. I consider that it is a necessary inference from his condition in December 1912 and his conduct that he has committed adultery.

(1) [1901] 17 T. L. R. 62.

As regards the incidents alleged to prove cruelty there is no doubt that respondent did severely assault his wife on 12th May 1912. Owing to the untrustworthy nature of petitioner's evidence it is impossible to find what were the exact facts that led to the assault. Respondent allows that he had been drinking that morning, it may be that he received certain provocation from his wife. The offence was condoned, but as I have held adultery to be proved, it revived. There is abundant authority for saying it revived. I would refer to the case of *Palmer* v. *Palmer* (2), *Blandford* v. *Blandford* (3) and *Moore* v. *Moore* (4). As regards the incident of 19th July the same difficulty arises in finding the true facts. Respondent's explanation in the face of the evidence of the policemen corroborated as they are by the entry in the general diary of the police station, does not seem to be true, but petitioner may be much exaggerating the matter. Her verbal statement, as compared with the entry in the diary differs. There seems to have been a quarrel between her and her husband, but the facts do not appear to be clear as to what happened. The story that she was bitten on her breast is perhaps improbable. It is not shown that she ever showed the mark to anyone. Again, as regards the alleged incident of 14th December, the same remarks apply. We have only her statement and it cannot be relied on.

As regards the other incidents they are not proved. We are, therefore left with the facts that adultery is proved and also an assault on 12th May 1912. The one assault, especially as there may have been provocation, is not sufficient, in my opinion, to prove legal cruelty. We are therefore left with the adultery. Mere adultery is not sufficient to grant a decree for dissolution of marriage; but it is sufficient to grant a decree for judicial separation. The question is, whether such a decree should be granted in view of the relations that may exist or may have existed between petitioner and Brunsden. There is no good evidence of any adultery on petitioner's part. There is no trustworthy evidence of it and it is improbable in view of the respondent's letters (admittedly written after he had, as he says, been informed of the adultery) begging her to return to him. If he had good grounds for accusing her of adultery he would probably have said something about it in these letters. They would have been couched in very different terms. The question seems to be whether there has been any such wilful neglect or misconduct on the part of his wife to him as has conduced to his adultery. His allegations that his wife refused him conjugal intercourse for some two months rest on his own statement and I have already found him untruthful. I cannot therefore accept them. He says that before his mali told him in January 1913 of his wife's conduct he had no suspicions against Brunsden. He accepted a present from Brunsden in August 1912 and allows that on 17th September he and Brunsden were on friendly terms performing at a concert together. In the face of such admissions I cannot see how any relations between his wife and Brunsden conduced to his adultery.

I would therefore, setting aside the decree of the learned Judge on the original side, give petitioner a decree for judicial separation.

I would also allow her the costs of this appeal fixing the advocate's fee at eight gold mohurs.

The questions as to what alimony, if any, should be granted and who should have the custody of the child, the issue of the marriage may be dealt with on separate application.

Twomey, J.—I concur.

K.N/.R.K. *Appeal allowed.*

(2) [1860] 29 L. J. M. 124=2 Sw. & Tr. 61=2 L. T. 363=8 W. R. 504.
(3) [1883] 8 P. D. 19=52 L. J. P. 17=48 L. T. 238=31 W. R. 508.
(4) [1892] P. 382=62 L. J. P. 10=67 L. T 539.

A. I. R. 1914 Lower Burma 173

ORMOND AND PARLETT, JJ.

P. R. N. Palaniappa Chetty — Defendant—Appellant.

v.

P. M. R. M. Firm— Plaintiffs — Respondents.

First Appeal No. 69 of 1912, Decided on 12th February 1914.

(a) Limitation Act (9 of 1908), Arts. 89 and 90—Suit against agent for misconduct — Limitation begins when misconduct of agent is disclosed after getting possession of accounts.

In a suit by a principal against his agent for damages for misconduct and neglect, know-

ledge of the acts of agent's misconduct can be fully obtained only when the principal gets back his books of account from the agent.

Where after the termination of an agency, the agent first handed over the books of account to a panchayat from whom the principal secured them after some time:

Held: that the period of limitation under Art. 90, Sch. 1, Limitation Act for the principal's suit against the agent for his misconduct would run from the day on which he got the books of account from the panchayat.

[P 175 C 1]

(b) Civil P. C. (5 of 1908), O. 3, R. 2 and O. 6, R. 15—Agent can sign amended plaint.

An agent authorized to enter appearance in suits can sign the amended plaint when once the suit has been instituted with the approval of the plaintiff. [P 175 C 2]

S. N. Sen—for Appellant.

J. R. Das—for Respondents.

Judgment.—On 1st April 1911 the plaintiffs-respondents P. M. R. M., a Chetty firm consisting of four partners mentioned by name in the plaint, sued their agent, the defendant, for an account alleging mismanagement, neglect, fraud, etc., and assessed the amount due to them at Rs. 7,500 stating that the cause of action arose on 5th May 1908, when the agency was terminated. They also estimated the value of the documents and securities, etc., to be recovered at Rs. 500 making a total of Rs. 8,000. The defendant was originally appointed agent from November 1902 for a period of three years. In the plaint the plaintiffs stated that at the expiration of the three years, owing to the mismanagement and neglect of defendant, large amounts were found outstanding, and with a view to their realization the period of his services was extended on the same terms as originally agreed upon as regards rate of salary; that finding defendant unable to realize the said outstandings, the plaintiffs sent another agent for his relief and directed him (presumably the defendant) to render an account of all his dealings with the firm's money and to make over all the firm's properties, viz. cash, books of account, etc., to the said new agent. The defendant in this written statement denies that the new agent was sent out.

Narayanan, the son of one of the partners of the plaintiff's firm, came to Rangoon in 1906, and from his evidence it appears that the defendant refused to make over the books of account, that the books of account were made over by the defendant to a panchayat in November 1907 and only obtained by the plaintiff or his agent from the panchayat in May 1908. The learned District Judge held that the claim for an account was barred under Art. 89, Limitation Act, inasmuch as the agency must have been terminated before 27th November 1907 when the books were handed over to the panchayat and the suit was instituted more than three years after that date. The plaintiff then applied to amend his plaint by asking for damages for the debt, etc., alleging certain specific acts mentioned in the said schedule to the amended plaint. In that amended plaint the cause of action is said to have arisen on 5th May 1908. The amendment was opposed by the defendant's advocate, but was allowed on 7th March 1912. Under Art. 90 a suit by a principal against an agent for neglect or misconduct could be brought within a period of three years from the time such neglect or misconduct became known to the plaintiff. The knowledge of these acts of misconduct could only be known to the plaintiff from the books and the evidence shows that he did not get these books until May 1908, which would be within three years from the date of institution of the suit but would be more than three years from the time when the amendment was allowed.

In one sense the amendment altered the cause of action. The plaintiff originally asked for an account only. By his amendment he asked for damages for negligence, but both cases would involve liability of the defendant for damages for these acts of negligence, and as pointed out the original plaint alleges misconduct though it does not specify the specific acts. The onus is more heavily on the plaintiff in the amended plaint than in the original plaint. It is contended for the defendant that the amendment should not have been allowed and that if it was allowed, the period of limitation should have been reckoned up to the date of the amendment. Aut if it is treated as an amendment, the time will run up to the date of the original plaint. Very wide powers are granted to the Court for allowing amendments to pleadings, and we think the amendment was properly allowed. It is then contended for

S. N. DAR, B.A.
Vakil High Court
SRINAGAR (Kash

the defendant that under Art. 90, limitation would run from the time when the plaintiff should have known of defendant's misconduct, that he had knowledge of some misconduct on the part of the defendant at the end of 1905, and that therefore his claim under Art. 90 for damages should be held to be barred. We are not prepared to hold that in Art. 90 after the words "becomes known" we should read the words, "or might have become" or "should have become known" to the plaintiff. Moreover, as pointed out above, the plaintiff could have no sufficient knowledge of negligence upon which he could bring a suit for damages as long as he was not in possession of the books.

The original plaint was signed by the managing partner of the plaintiffs, subsequently one of the four partners (the managing partner) died, and an agent who has been appointed under a general power by that managing partner signed the amended plaint. It is contested that the amended plaint therefore was not duly signed and the agent was never authorized to sign it because the firm ceased to exist upon the death of one of their partners and the authority for the agent would thereby also cease. But amended plaint states that the agent was carrying on the business for the surviving partners of the plaintiff's firm in their names and they were all resident outside the jurisdiction of the Court. That fact has not been challenged. He would therefore be a recognized agent within the meaning of O. 3, R. 2, by whom appeals, applications and certain acts in the suit may be done. We were referred to the case of *M. E. Mootala and Co.*, v. *Poonaswamy* (1). There it was held that an agent carrying on business in the name of his absent principal could not sign a plaint unless he was authorized to do so either expressly or impliedly. One of the reasons in that judgment was that otherwise the principal would be subjected to the risk of being involved in litigation without his knowledge at the instance of an agent whom he had appointed merely for the purpose of carrying on the business and had not expressly authorized to institute suits. That reasoning would not apply to the case of an agent, even though not authorized to institute suits, being authorized or impliedly authorized to amend the plaint. Amendments vary in degree and it would be extremely inconvenient if the recognized agent who can enter an appearance should be incapable of agreeing to an amendment however small, on behalf of his absent principal. We think such an agent would have the power to sign an amended plaint when once the suit has been instituted with the approval of the plaintiff.

As to the facts of the case the defendant did not appear at the hearing: the evidence therefore is all ex parte and the acts of negligence have been, we think, sufficiently proved. They consist of lending money on mortgage-bonds which were not registered, of which registration was compulsory and which therefore were no security and the money could not be collected from the debtors. In one instance the defendant had collected the money but had not entered it in his books. The other item is for moneys overdrawn by the defendant.

We dismiss the appeal with costs.

K.N./R.K. *Appeal dismissed.*

(1) [1913] 2 L. B. R. 41.

A. I. R. 1914 Lower Burma 175

FOX, C. J. AND PARLETT, J.

Nga Kya Thin—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 768 of 1914, Decided on 23rd November 1914, from order of Sess. Judge, Prome, D/- 28th September 1914.

Evidence Act (1 of 1872), S. 24—Confession by accused to thugyi or headman on inducement is inadmissible — What is inducement stated.

The thugyi or headman of a village is a person in authority within the meaning of S. 24, Evidence Act. Therefore the confession made by an accused to the thugyi on being sent for by him after he was told that he would not be punished if he had not taken part in the offence, is irrelevant and inadmissible in evidence, as what the thugyi told the accused was an inducement to make a statement.

[P 176 C 1]

Other questions and answers in the examination of the accused based on this inadmissible statement are also inadmissible.

[P 176 C 1]

Fox, C. J.—The appellant, Kya Thein, was tried with Lu Po and Po U for the murder of Pan Bu. Lu Po and Po U were acquitted. Kya Thein was convicted and sentenced to death.

None of the witnesses saw the murder committed. Two of them say that they saw Kya Thein following Pan Bu who wasgoing in the direction of the spot where Pan Bu was assaulted. One witness said that on the morning of the day on which the murder was committed, he saw the dah which was subsequently found near where Pan Bu's corpse had lain, in Kya Thein's hand. His father said he fell in with him returning to the village as he (the father) was driving back his cattle, presumably some time in the forenoon of the day.

There is also evidence that in the afternoon of the day, Kay Thein openly made some enigmatic remarks about what would happen if one man killed another without anyone else being present and what would happen if two men murdered a man. Some of this evidence appears doubtful, but even if it was all true, it would not warrant the conviction of Kya Thein. He has been convicted on the conclusions which the Judge drew from statements he himself made. The first of those was made to the headman of a village close to Kya Thein's village four days after the murder. The others were made to the committing Magistrate and Sessions Judge. The later ones are not entirely the same as the first; where they differ from it the later ones show an attempt to offer explanation of his conduct more favourable to himself, but in the main they followed up the first statement. None were confessions in the ordinary sense of the word, but all contained incriminating statements from which the Judge and assessors drew the conclusion that he took part in the murder even if he alone did not commit it. The circumstances under which the village headman came to question Kya Thein and what he exactly said to him have not been gone into as fully as they might have been. In the Magistrate's Court, Maung Aung said he questioned him for about two hours in the presence of a ten-house 'gaung' Maung Pu. He had sent for him· he did this because he had been told that the township officer had ordered him to investigate the case. The Police Inspector however stated that whilst he was making inquiries suspecting Kya Thein, the thugyi Maung Aung intervened and asked to be allowed to question him.

In the Sessions Court Maung Aung stated what took place in the first instance at the protracted interview in the following words: he spoke from memory having taken nothing down in writing:

"I questioned him. He said: 'I know the facts. I want to speak out. I am afraid of the thugyi Lu Po's brother (referring to the thugyi of his own village) and I am also afraid of Lu Po.' I told him not to be afraid of the thugyi. He said: 'Shall I be punished, if I speak out?' I told him: 'If you took part, you will be punished. If not, you will not.' (This last word was evidently omitted by the Sessions Judge by inadvertence). He said: 'In that case as I did not take part, I will speak out."

Kya Thein then proceeded to state his story which certainly could not have taken two hours or anything like so long a time to relate. In the Magistrate's Court Maung Aung said that at the beginning he questioned the accused as to whether he did not know anything about the case Kya Thein said if nothing would happen to him he would reveal the facts of the case, and then he (Maung Aung) said that if he was not concerned nothing would happen to him. There can, I think, be little doubt that whatever the actual expressions used were, the impression conveyed to Kya Thein's mind must have been that if he had not taken part in the actual murder, he would not be punished. He made a statement according to which he did not take part in the actual murder, which he said was committed by Po U and Lu Po without any assistance from him. His subsequent statements were to the same effect and his defence was that he should not be convicted as he had brought the case against his fellow-accused to light. The other two accused escaped conviction because there was no trustworthy evidence against them. The main facts stated by Kya Thein however have the ring of truth. Although it is possible that the murder of Pan Bu and the dragging or carrying of his body from the place where he was first struck to where his corpse was found may have been done by one man and that that man was Kya Thein, it appears far more probable that those things were done by two men and there does not appear to be any reason why Kya Thein should have said they

were done by Po U and Lu Po, if they did not do them.

The first question however which arises in the case is whether Kya Thein's first statement amounting in law to a confession was admissibie in evidence. Maung Aung, the thugyi, was a person in authority within the meaning of S. 24, Evidence Act, and the question is whether it should be held that the incriminating statement and confession appears to have been caused by any inducement, threat or promise proceeding from him sufficient in the opinion of the Court to give Kya Thein ground which appears to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. In the first place it is to be noted that Kya Thein did not go to the thugyi of his own motion. He was sent for and must have gone to him because he was sent for by a person in authority. He did not at once offer to make a statement. He made one only after the thugyi had told him he would not be punished if he had not taken part in the murder. The question then is whether what the thugyi said to him constituted an inducement to make a statement, for I do not think there can be any doubt that the statement was caused by what the thugyi said to him. The object of the thugyi must have been to induce him to make a statement about the murder. His assurance that the man he was talking to about it would not be punished if he had not taken part in it, brought out the statement.

In Ameer Ali and Woodroffe's Notes to S. 24, Evidence Act, are given examples of expressions which have been held to constitute inducements, threats or promises. Some are weaker than those which the Thugyi said he used to Kya Thein. It is evident that the Courts jealously guard against every attempt by a person in authority to obtain self-incriminating statements from suspected or accused persons.

In my opinion what the thugyi said to Kya Thein was an inducement and as Kya Thein confession was caused by it, what was said gave him reasonable grounds for supposing that by making it he would escape all punishment, the confession was irrelevant and inadmissible in evidence. Excluding this as evidence against him there remains the fact that he pointed out the place or the proximity of the place where the *dah* with which the murder was in all probability committed was found. This was consistent with his story that he was a witness of the murder and saw what took place afterwards, and amongst other things saw Lu Po put the *dah* behind a tree. There are also his statements in examination by the Magistrate and Judge to be considered. In those he omitted, except when questioned by the Judge upon what he had stated to the thugyi, all reference to his having heard Lu Po and Po U conspiring together to rob and kill Pan Bu. He said he left the village to look for a bullock and saw his two co-accused at the edge of some jungle and, thinking that they were hunting wild cats, he followed them from a distance and whilst doing so, he saw Po U strike Pan Bu and Po U and Lu Po drag him off into the water-course where Po U cut his neck. He thus represented himself as having been a spectator of the occurrence by chance and not by design, whereas in his statement to the thugyi the fact that he was on the spot by design is scarcely concealed.

The Sessions Judge in his memorandum of what the accused stated to him makes him say "Yes" to the question, "Did you cut Mg. Pan Bu with a *dah*?" This is an obvious mistake and must again be due to inadvertence. The actual answer according to the record in Burmese was "No"; and from the subsequent questions this must have been the actual answer. If there had not been a record in Burmese as well as one in English, the mistake might have led to serious results. The Sessions Judge questioned Kya Thein as to whether he had not told the thugyi that he had heard Lu Po and Po U conspire to kill Pan Bu and Kya Thein admitted he had done so, and on this were founded other questions which could only have been asked by the Judge if the statement made to the thugyi was properly in evidence. All these questions and answers must, in my opinion, be left out of consideration, since the basis of them was inadmissible. The result is that, in my opinion, this is not sufficient to support the conviction

of the accused and I would reverse the conviction and sentence and acquit him.

Parlett, J.—I concur.

K.N./R.K. *Sentence reversed.*

A. I. R. 1914 Lower Burma 178 (1)

FOX, C. J. AND HARTNOLL, J.

U Wisaya—Appellant.

v.

U Zaw Ta—Respondent.

First Appeal No. 130 of 1913, Decided on 22nd December 1914.

(a) Civil P. C. (1908), S. 9—Civil Courts can try ecclesiastical suits.

The civil Courts in Lower Burma have jurisdiction to entertain and try suits of ecclesiastical nature. [P 178 C 2]

(b) Buddhist Law (Burmese)—Texts—Kathanabaing authority recognized in Upper but not in Lower Burma.

The Government has recognized the authority of kathanabaing in Upper Burma, but not in Lower Burma. [P 178 C 1, 2]

May Oung—for Appellant.

Mg Po Han—for Respondent.

Judgment.—The suit is one between two Burman Buddhist priests. The appellant sued the respondent to recover possession of certain lands of which he has been in possession for a considerable number of years and for possession of certain religious manuscripts. The lands appear to be lands that have been occupied by members of the Buddhist priesthood for a long period of years, and the points at issue between the parties appear to involve points of Burmese Buddhist Ecclesiastical law. The suit has been dismissed on the ground that civil Courts should abstain from deciding points which fall within the sphere of ecclesiastical jurisdiction. In appeal it is urged that there are no ecclesiastical Courts in Lower Burma and that the case is triable by a civil Court. In Upper Burma it has been ruled that the civil Courts are bound by the decisions of the Buddhist ecclesiastical authorities in matters within their competence and that they should also abstain from deciding points which fall within the sphere of ecclesiastical jurisdiction. It has been brought to our notice that Government has recognized the authority of the Taung Win Sayadaw as kathanabaing of Upper Burma (Burma Gazette, General Department Notification No. 255 of 22nd October 1903, p. 715); but Government has not recognized the authority of the kathanabaing in Lower Burma as appears from the record of the proceedings of the Legislative Council on 6th April last (Burma Gazette, Part 3, pp. 72, 73). There are therefore no ecclesiastical authorities in Lower Burma. S. 9, Civil P. C., enacts that the Courts shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. This is a suit of a civil nature. It is a claim to certain lands and manuscripts.

The civil Courts, in our opinion, clearly have jurisdiction to decide the suit and should do so. The appeal is allowed with costs and the decree of the District Court is reversed. The District Court will proceed to decide the suit on its merits, and the costs in that Court will follow the final result. The appellant will receive a certificate under S. 13, Court-fees Act, authorizing him to receive back from the Collector the full amount of fee paid on the memorandum of appeal.

K.N./R.K. *Appeal allowed.*

A. I. R. 1914 Lower Burma 178 (2)

HARTNOLL, OFFG. C. J. AND TWOMEY, J.

Maung Maung—Applicant.

v.

Wightman & Co. and *another*—Respondents.

Civil Misc. Appln. No. 128 of 1912, Decided on 12th August 1913.

(a) Civil P. C. (5 of 1908), S. 47 and O. 21 R. 19 — Decree-holder auction-purchaser taking possession but sale set aside—Question of mesne profits must be decided in execution and amount can be set off before subsequent sale.

Where a decree-holder himself purchased the property of his judgment-debtor at an auction sale which was set aside owing to certain irregularities, and the judgment-debtor at the time of consideration of the proclamations for the next sale claimed to set-off against the decretal amount the net income derived from the property by the decree-holder when he was in possession after the sale:

Held: that the matter of what was due owing to the decree-holder's occupation was one which should be dealt with in execution proceedings and not by a separate suit; and that the judgment-debtor was entitled to have set-off against the decretal amount the net profit enjoyed by the decree-holder. [P 179 C 2]

(b) Civil P. C. (5 of 1908), O. 21, R. 66—Fair and accurate value must be given—Omission sufficient to stay sale.

Under O. 21, R. 66, Civil P. C., the value of the property to be sold is a very material thing for the purchaser to know.

Where a fair and accurate value is not given in the proclamation for sale, it will be sufficient reason for staying the sale. [P 179 C 2]

(c) Civil P. C. (5 of 1908), O. 34, R. 3—First mortgagee can sell property in execution irrespective of subsequent claims or litigations.

The first mortgagee is entitled to bring the mortgaged property to sale in execution of his decree irrespective of what other claims there may be that are subsequent to his, and irrespective of litigation that may prejudice the interests of a subsequent mortgagee. [P 180 C 1]

McDonnell—for Appellant.

S. N. Sen—for Respondents.

Hartnoll, Offg. C. J.—This is an application for stay of the sale of two mills, their sites and the buildings in connexion with them. They are proclaimed for sale in execution proceedings. Their sale was ordered for the 9th instant and as we decided that the sales should he stayed we issued telegraphic instructions to this effect as this order could not reach the District Court in time to stay the sales.

They are being sold by the respondents, Messrs. Wightman & Co., in execution of a mortgage decree obtained against the appellant Maung Maung. They were sold in execution last year in these same execution proceedings, but the sales were set aside owing to certain irregularities. Messrs. Wightman & Co., decree-holders, purchased them. They were therefore in possession of them for some time and worked them, but went out of possession when the sales were set aside. When the proclamations for the present sales were being considered, Rs. 84,522-8-0 was the sum calculated to be due on the decree. Appellant claimed to set-off against this sum the net income derived from the mills by respondents when they were in possession. The respondents made this sum Rs. 7,000 odd, but appellant says that it is much more. At the argument it was stated that appellant claimed the amount to be Rs. 30,000. A Commissioner had been appointed to take accounts and ascertain what it is.

Appellant urges that no sale should take place until this sum has been ascertained. It is allowed that he does not claim it to be more than Rs. 30,000. Respondents agreed to allow the net profit to be set off against the mortgage debt and so the sum stated to be due in one of the proclamations is Rs. 77,828. There seems to be an error in the other, where the sum was entered as Rs. 72,828. It would appear to be correct that this matter of what is due owing to respondents' occupation is one which should be dealt with in execution proceedings and not by a separate suit and that appellant is entitled to have set off against the decretal amount the net profit enjoyed by respondents.

Another objection raised is that the value of the mills is not accurately stated in the proclamations. In one, the mill is stated to be valued by the decree-holders at Rs 30,000 and by the judgment-debtor at Rs. 60,000. In the other the value is said to be given by the decree-holders at Rs. 45 000 and by the judgment-debtor at Rs. 60,000. It is urged that valuations of this nature will vitiate the sale. O. 21, R. 66 lays down that the proclamation shall specify as fairly and accurately as possible, amongst other things, every other thing which the Court considers material for the purchaser to know in order to judge of the nature and value of the property. In the case of *Saadatmand Khan* v. *Phul Kuar* (1) their Lordships of the Privy Council said: "Whatever material fact is stated in the proclamation (and the value of the property is a very material fact) must he considered as one of those things which the Court considers material for the purchaser to know and it is enacted in terms (though express enactment is hardly necessary for such an object) that those things shall be stated as fairly and accurately as possible." The words in the Code in force when that case was decided are the same as those in the rule now in force. It is impossible to hold that a fair and accurate value is given in the proclamations now under consideration and this is a sufficient reason for staying the sales.

A further objection is made that the maximum capacities of outturn are not given accurately. In the case of one mill, it is given, as estimated by the decree-holders, 3,000 baskets of rice in twelve hours and, as estimated by the judgment-debtor, 3,500 to 3,700 baskets, according to the quality. In the case of the other mill the figures are given respectively in the same way as 1,500 baskets and 1,800 to 2,000 baskets accord-

(1) [1898] 20 All. 412=25 I. A. 146=7 Sar. 330 =2 C. W. N. 550 (P.C.).

ing to the quality. There is no sufficient variation in a matter of this description as would constitute a material irregularity, although it would be better to give one estimated outturn only; but the outturn must differ from time to time.

There is a second mortgagee, Messrs. Moosajee Ahmed & Co., and he objects to the sales proceeding till the termination of an appeal in a suit which has been dismissed and in which the judgment-debtor's wife is claiming in her own right a half-share or interest in the mills.

This last objection, in my opinion, is of no force. The first mortgagee is entitled to his money and to bring the mills to sale in execution of his decree, irrespective of what other claims there may be that are subsequent to his and irrespective of litigation that may prejudice the interests of a subsequent mortgagee. When the latter made his loan he should have considered all such risks, and the first mortgagee cannot be delayed by the fact that the sales might prejudice the second mortgagee.

On the ground that the valuation of mills is not as accurately shown in the proclamations as possible, the sales are stayed and fresh proclamations must issue when the mills have been as accurately valued as possible. Evidence must be produced before the District Judge from which he can fix their values. The inquiry should not be long or protracted but summary and both partics should be allowed to produce evidence. This is an exceptional case, as it is not often that mills of this nature are sold in execution in this Province, and I would not say that in all cases it is necessary to hold an inquiry of this nature. Each case must be dealt with on its merits.

When values have been fixed, and, if possible, a more accurate description of maximum capacities of outturn has been given, the mills can be then proclaimed again for sale. On the date fixed for sale, if it is then known exactly what should be set off against the decretal amount on account of the net sum received by respondents, when they were in possession and working the mills, the sales can then take place to recover the sum due. If one mill does not fetch such sum, the more valuable one being sold first, the second can then be sold. If such sum has not been ascertained on the date fixed for the sale, the more valuable mill and premises appertaining to it should be sold. If it fetches a sum within Rs. 30,000 of the sum due on the decree, not taking into account any set-off on account of the sum due by respondents on account of their occupation, then the sale of the second mill should be stayed, pending the ascertainment of such sum. But if it fetched any less sum than this, the second mill should also be sold. For example, on the date of the sale, Rs. 86,000 was found due on the decree, not taking into account any set-off against it on account of the respondents' occupation. If the mill sold fetches Rs. 56,000 or more, the second should not be sold as it may be found that there is due from the respondents on account of their occupation Rs. 30,000. This Rs. 30,000 plus Rs. 56,000 realized for the mill sold would satisfy the decree. If the mill sold only realises Rs. 50,000, then the second mill should be sold in any case, as if Rs. 30,000 were found to be due by respondents as a set-off on account of their occupation, even that sum would not, with the Rs. 50,000 realized by the sale of the mill, satisfy the decree and so the second mill would have to be sold in any case. It must be remembered that Rs. 30,000 is the maximum claim of Maung Maung as a set-off. I would pass no order as to the costs of this appeal as I am not satisfied that Maung Maung has not unnecessarily been delaying execution.

Twomey, J.—I concur.

K.N./R.K. *Order accordingly.*

A. I. R. 1914 Lower Burma 180

ROBINSON, J.

V. R. M. V. A. Chetty Firm—Appellants.

v.

Maung Po Sin—Respondent.

Second Appeal No. 152 of 1912, Decided on 17th February 1914.

(a) Transfer of Property Act (4 of 1882), S. 53—Suit under S. 53 must be as representing other creditors — Objection on this ground must be raised in first Court.

A suit founded on S. 53, must be framed as for or on behalf of all the creditors generally. An objection on this ground, to prevail, must be taken in the first Court, but if not so taken, cannot avail in the appeal Court. [P 182 C 1]

(b) Transfer of Property Act (4 of 1882), S. 53—Intention to defraud must be general and not against one creditor alone.

The intent, which gives a creditor the right to have a transfer by his debtor of immovable property avoided, must be an intent to defeat or delay his creditors generally. Therefore a transfer, made with intent to defeat or delay any one particlar creditor cannot be avoided against that particular creditor provided that there has been good consideration and the transaction is not a mere sham. [P 181 C 2]

(c) Transfer of Property Act (4 of 1882), S. 53— Undue preference to one creditor though not bona fide is not sufficient to set aside transfer—Difference between creditor and stranger purchaser in respect of proof pointed out.

A transfer, with intent to defraud creditors generally, made in favour of a creditor securing payment of the debt due to himself by superior diligence cannot be set aside, even if he was aware of the vendor's intention to defeat his other creditors. In other words, in the case of such a creditor, proof of valuable consideration is ordinarily sufficient, but not so in the case of a purchaser for present consideration who must prove not only valuable consideration but also the further fact that he was not aware of the vendor's fraudulent intent and that he did not enter into the transaction for the purpose of aiding the fraudulent transfer : 25 *Bom.* 202; 3 *L. B. R.* 188; 34 *Cal.* 999 and 8 *I. C.* 965, *Foll.* [P 182 C 1]

(d) Transfer of Property Act (4 of 1882), S. 53—Relationship only raises suspicion but is no proof of aiding fraudulent transfer.

Relationship alone between the transferor and the transferee is not sufficient to establish aiding the fraudulent transfer but it is a circumstance giving rise to suspicion and one that must therefore be very carefully considered. [P 182 C 1]

Palit—for Appellant.

Moosajee—for Respondents.

Judgment.—This is a dispute between an attaching creditor and an alleged purchaser from the judgment-debtor. Plaintiff obtained a decree for Rs. 1,400 and costs against one Mg. Ma Gyi on 25th June 1908. He applied for attachment of the property on 10th November 1909. Mg. Ma Gyi then applied on 13th December 1909 alleging that the decree had been satisfied. His application was rejected on 12th February 1910.

Attachment was then affixed on the property on 27th Fubruary 1910.

Then Mg. Po Sin applied for the removal of the attachment alleging that on 22nd December 1909, he had purchased the property from Mg. Ma Gyi for Rs. 1,000 by a registered deed.

An ex parte order was passed removing the attachment on 12th October 1910.

The present suit was filed on 4th August 1911 for a declaration that the property does not belong to Mg. Po Sin, but at the date of attachment belonged to and was in the possession of Mg. Ma Gyi.

I have been referred to the following decisions. In *Bhagawant Appaji* v. *Kidari Kashinath* (1) it was held after a very full and complete examination of all the authorities, that Cl. 2, S. 53, T.P. Act, did not apply as it was not found that the transfer in question was made fraudulently or for a grossly inadequate consideration and also that although the object of the transfer was to defeat an anticipated execution, that did not show that the intent was to defeat or delay the creditors generally so as to render Cl. 1 of the section applicable.

In this case the transferee was another creditor and it was held that the onus lay on plaintiff in the first instance to prove that the consideration or part of it was illusory.

This case was followed by Sir Charles Fox, C. J., in the case of *San Dun* v. *Mein Gale* (2), who held that the intent which gives a creditor the right to have a transfer by his debtor of immovable property avoided must be an intent to defeat or delay his creditors generally. "If there has been good consideration, and the transaction is not a mere sham, a transfer by a debtor, even if made with intent to defeat and delay one particular creditor, is not impugnable by that creditor." In this case the purchasers were sons of the judgment-debtor.

In *Hakim Lal* v. *Mooshahar Sahu* (3), the same was held, the transferee being another creditor. This case was followed by Sir Henry Hartnoll in *Maung San* v. *Sit Twan* (4). Mg San was also a creditor and the question considered was whether Mg. San's purpose was merely to secure his debt or his intention was also to aid Mg. Pa Si in defeating Mg. Sit Twan, in covering up his property, in giving him a secret interest therein and in locking it up for Mg. Pa Si's own use and benefit.

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(1) [1911] 25 Bom. 202=2 Bom. L. R. 986.
(2) [1905-06] 3 L. B. R. 188.
(3) [1907] 34 Cal. 999=6 C. L. J. 410=11 C. W. N. 889.
(4) [1910] 8 I. C. 965=5 L. B. R. 195.

In the present case the transferee is Mg. Ma Gyi's son-in-law's brother according to the lower appellate Court and he is his brother-in-law according to the plaint. He is however a volunteer in this matter and not a creditor securing payment of the debt due to himself by superior diligence. He purchased "for a present consideration ; he had nothing at stake, no self-interest to serve; he may with perfect safety keep out of the transaction", to use the language of *Lockrain* v. *Rastan* (5) quoted in *Hakim Lal* v. *Mooshahar Sahu* (3). In the case of a creditor securing himself, proof of valuable consideration would ordinarily be sufficient. He may be aware of his vendor's intention to defeat his other creditors and yet this would not be enough to cause the transaction to be set aside. In the case of a volunteer however the law would say that he enters into it for the purpose of aiding that fraudulent purpose. Relationship alone is not sufficient to establish such aiding, but it must be a circumstance giving rise to suspicion and one that must therefore be very carefully considered.

The learned Divisional Judge had some doubt owing to the two rulings of this Court appearing to him to be somewhat in conflict and I think I should therefore state what I consider they lay down. Sir Charles Fox based his decision on what is a recognized rule, namely, that a suit founded on S. 53, T. P. Act, must be framed as for or on behalf of all the creditors generally. If this objection be taken in the first Court and the suit is one on S. 53, the contention must prevail. The report does not show whether objection was taken in the earlier stages or only in second appeal. If taken in second appeal for the first time, as has been pointed out in the cases cited above, it should not be allowed to prevail. It is so taken here and I cannot therefore enforce that rule. Moreover the plaint here alleges it was to defeat plaintiff and other creditors. Sir Henry Hartnoll based his decision on another rule, the purchaser in his case being a creditor.

The questions to be decided in this case are in my opinion:

1. Was valuable consideration paid?
2. Did Mg. Mg. Gale act with intent to defeat his creditor by removing the property out of his reach?
3. If so, was Mg. Po Sin aware of this intent and did he purchase in order to aid and abet Mg. Ma Gale?

If there was no consideration or no real consideration the transaction was merely a sham and must be void as against the creditor. If valuable consideration was paid then in the case of a pure volunteer that is not enough and the further questions, stated above, if answered against the purchaser, will avoid his purchase.

When Mg. Po Sin applied to have the attachment removed, Mr. Dhar appeared for plaintiff and opposed it and a day was fixed for hearing. The Court took the case up and was apparently informed that Mr. Dhar was coming. The note to this effect in the diary records that the person appearing for plaintiff was only a clerk and had no power-of-attorney and could not instruct Mr. Dhar. It is then erased and the case taken up ex parte the attachment being removed. However the onus is on plaintiff to start with.

Plaintiff alleged defendant was Mg. Ma Giy's son-in-law. In evidence his witness stated he was his son-in-law's brother. The allegation in the plaint was not specifically denied in the written statement, but Mg. Po Sin and Mg Tha Moung who was also said to be a son-in-law denied the fact absolutely. Plaintiff has not proved any relationship.

As to consideration defendant states the land is worth Rs. 30 an acre and the area is nearly 42 acres. At this rate there is perhaps no very great inadequacy in the price, though Rs. 30 an acre does not seem to be much. No evidence of the value is, however, given and I must therefore hold that the consideration, if paid, was valuable. As to payment defendant alleges that Mg. Ma Gyi and his wife came to him and asked him to buy. This was two days before the deed was executed, that is, therefore on 22nd December 1909. The land he says is near his house and he agreed to buy. On 22nd December, they came again and defendant went out and called in Mg. Tha Moung and Mg. Shwe Kyin Ket. In their presence he paid Rs. 700. They all adjourned to Mr. Power's house and the deed was drawn up and registered the same day, the balance being paid at the Registration

(5) [1899] 9 North Dakota 435=81 N. W. 60.

office. Tha Moung is called but not Shwe Kyin Ket. Tha Moung says he alone was present when Rs. 700 were paid. He had not forgotten Shwe Kyin Ket, for he says he was at the registration office. The discrepancy is somewhat significant.

At Mr. Power's house Mg. Ma Gyi was questioned as to encumbrances. Plaintiff's claim was mentioned by Mg. Ma Gyi who said it had been satisfied by the transfer of his other land. Mg. Ma Gyi had applied on 13th December alleging plaintiff's decree had been satisfied by transfer of the land. By this manoeuvre he obtained postponement of the attachment and he employed it in selling the land to defendant. His application was dismissed.

Defendant says he had not owned any land before, but had worked other people's land and had made a profit of about Rs. 400 a year. Out of his earnings he had bought three pairs of buffaloes and one pair of oxen. His savings he kept in his house and had Rs. 1,700 in cash in a box at the time of purchase. Rs. 700 seems a large sum to have paid before the deed was drawn up but the matter was to be settled forthwith.

The land was said to have been sold as Mg. Ma Gyi did not want to live there any longer.

That Mg. Ma Gyi wanted to save what he could from the grip of the Chetty is clear. The Chetty had a mortgage, but it was not registered and he only got a money decree. Then attachment is applied for on 10th November, and the judgment-debtors called upon to show cause. Mg. Ma Gyi appeared and alleged satisfaction and a few days later sells before orders were passed. Defendant knew admittedly all about this, but makes out that he believed what was told him. He made no inquiries. I am satisfied that he knew all about the facts, and I cannot believe he did not know what Mg. Ma Gyi's real object was. His explanation of how he had the money to pay is far from convincing and his statement in proof of payment is contradicted by his only witness. The alleged price paid is Rs. 250 less than the value of the land on his own figures.

On a careful consideration of the whole case it is clear that defendant was a pure volunteer. At best I can only hold that it has not been proved that he did not pay nor that the price was quite inadequate though it, even if paid, possibly was. I am satisfied that Mg. Ma Gyi intended to remove his property out of the reach of his creditor fraudulently and that defendant knew of his intentien and by his conduct aided him in doing so.

The claim for the costs of the miscellaneous case is not now pressed.

I accept the appeal and declare the sale void as regards the plaintiff who may attach this land in execution of his decree. Respondent must pay plaintiff's costs in all Courts.

K.N./R.K. *Appeal accepted.*

A. I. R. 1914 Lower Burma 183

YOUNG, J.

Dunji Deosi—Plaintiff.

v.

Pokermall Anandroy—Defendant.

Original Civil Suit No. 341 of 1912, Decided on 16th September 1913.

Contract—Teji mandi—Teji mandi contracts are unilateral and reciprocal—Formality of Teji mandi contract stated—Teji mandi contracts are not wagering contracts unless genuine delivery of goods was never intended.

Each contract. whether teji or mandi, is unilateral and not reciprocal—a purchase of an option in a teji contract to buy and in a mandi contract to sell at a given price in a given month. As a concise method of expressing their mutual intention, the teji eater signs the sold note and the mandi eater, the bought note, implying that he is bound; and the other party, in token of his freedom from the correlative obligation to take delivery in a teji or to give delivery in a mandi contract, does not sign the bought note in a teji or the sold note in a mandi contract. Each contract is entered in consideration of a small fixed payment to the seller or the buyer as the case may be, and in each case only a fixed brokerage in lieu of an ad valorem brokerage is paid at the inception of the contract. [P 185 C 1]

The purchase of an option or right to call for goods is not necessarily a wagering contract, and a contract is not a wagering contract unless neither of the parties intended under any circumstances to give or take delivery. The delivery however must be a genuine delivery and not a mere sham, not merely the delivery of a piece of paper never to be transformed into delivery of goods. [P 189 C 1]

In the rice trade the delivery of a milling notice is considered to be tantamount and equivalent to the delivery of the actual rice. [P 187 C 1]

Lentaigne and *Doctor*—for Plaintiff.

Giles, N. M. Cowasji and *A. B. Banerji*—for Defendant.

Judgment.—The main question in the case was whether a certain contract entered into at Rangoon relating to rice being one of a class known as teji contracts was void as being a wager. Before discussing this it is necessary to consider an argument raised upon the pleadings by the defendant, so far as I am able to understand it. The plaintiffs pleaded that by a contract, dated 10th February 1911, the defendant firm sold to the plaintiffs 10,000 bags of rice at Rs. 325 per 100 baskets deliverable ex-hopper all in August 1911, date at seller's option and on the same day executed a sale note, and that as and by way of consideration for the defendant's undertaking to give delivery to the plaintiffs (whenever the plaintiffs chose to call upon them) during the month of August the plaintiffs gave to the defendant Rs. 1,000 at the rate of Rs. 100 for every 1,000 bags. They then pleaded in para. 5 that according to the custom of the trade in such transactions they had the option of demanding delivery in August on paying the agreed price. I may at once say that I do not consider that these two paragraphs were very well or very clearly drafted. The payment of Rs. 1,000 was made not by way of consideration for the defendant's promise to deliver, which was already secured by plaintiff's promise to pay the agreed price, but as consideration for a promise on the part of the defendant not to proffer delivery unless called upon. The plaintiffs then proceeded to plead that they had called upon the defendant to deliver and that he had failed to do so and to claim damages on the basis of the difference between the market and contract rate on 31st August 1911. The defendant in his written statement denied having sold any rice to the plaintiffs as alleged, but pleaded that it was a teji-mandi transaction, i. e., a gambling transaction, and represented. a wager.

In the next paragraph he explained from his point of view or rather from the point of view of his defence what was meant by a teji mandi transaction, saying it was a bet on the market price of rice for the month of August, and admitted that he signed the sold note which he said was usual in such transactions, and added that the plaintiff did not sign any bought note, which is of course admitted. Except that defendant, in my opinion, was incorrect in describing the particular transaction sued on as a teji-mandi transaction and should have described It as a teji contract only, it seems to me that both parties are practically agreed as to the modus operandi but differ as to the intentions of the parties and the legal effect upon the contract arising therefrom. The defendant asserts that there was only an intention to pay differences and not to receive or give delivery of the rice, while the plaintiff urges that there was every intention to give and receive delivery of the commodity, at any rate as far as this could be effected by the delivery of milling orders, and that there was no intention either on his part or on that of the defendant merely to pay the difference between the contract price and the market rate. He says that this was one of a considerable number of contracts entered into between himself and the defendant in all of which he had duly received milling notice where he had demanded performance of the contract. Now a teji contract for rice as entered into in the Rangoon market seems to be as follows: There are two parties, the one being the buyer and the other the seller, who is called the person who eats teji (a Gujarati word meaning "rises"). The latter in payment of a fixed sum, small in relation to the value of the quantity of the rice dealt in, agrees to sell and deliver rice in a certain month at a certain price, but not to deliver it and demand the price unless called upon to do so.

It is virtually the purchase of an option or right to call for so much rice during a given month, the teji eater being bound to supply if called on, but the other not being bound either to demand or in default of a demand to accept delivery. If therefore the market price rises above the contract price it will be to the interest of the buyer to call for delivery; if on the other hand it falls below the contract rate, it will be to his interest not to do so. As delivery may be given during the whole month, the purchaser of the option naturally waits till towards its close for fear of a sudden fall between his call for delivery and the actual delivery. It is obvious therefore that the transaction may be a mere bet on the rise of the market, and if the intention of both parties was not to deliver but merely to pay the difference between the

teji and the market rate on the day of settlement, which in there contracts seems to have been the last day of the month, then according to the authorities it would, in my opinion, be considered to be such and the contract would be void under S. 30, Contract Act.

In a mandi contract, the procedure is the same, but the parties gamble, as the defendant would say, on the chance of a fall, mandi being the Gujerati term for a fall. A similar fixed premium is paid to the mandi eater, who in consideration thereof agrees to buy rice forward from the other party at a certain fixed rate. The mandi eater signs a bought note, but the other party signs no sold note. If the market falls below the mandi rate, the mandi eater is, as the plaintiff would say, called on to take delivery of the contract quantity and to pay more more than the market price of the day. If it did not fall below that price the mandi eater keeps the fixed premium but does not attempt to demand delivery. Each contract, therefore whether teji or mandi, is unilateral and not reciprocal — a purchase of an option in a teji contract to buy and in a mandi contract to sell rice at a given price in a given month. As a concise method of expressing their mutual intention, the teji eater signs the sold note and the mandi eater the bought note, imply that he is bound; and the other party, in token of his freedom from the correlative obligation to take delivery in a teji, or to give delivery in a mandi contract, does not sign the bought note, in a teji or the sold note in a mandi contract. This and the fact that a fixed brokerage in lieu of an ad valorem brokerage was paid at the inception of a teji or mandi contract seems to me the only paper differences between what has been called the ordinary and these which are alleged to be wagering contracts. All the minutiae of the genuine contracts were employed either, as the plaintiff says, because it is a genuine contract, or, as the defendant says, from a desire to hoodwink the Courts and force them to collect gambling debts if the teji or mandi eater repudiates. The bought or sold note used is precisely the same as that used in the ordinary contracts, the mills which in ordinary contracts it is usual to strike out from the list of those whose products the sellers may deliver, being struck out in these also.

From the fact that a sold note was signed, the defendant argued: (a) that the contract had been reduced to writing and that by virtue of S. 92, Evidence Act, this note must be deemed to embody the final terms of the agreement arrived at between the parties, and (b) that the contract embodied in this note did not represent the real agreement between the parties and that, therefore, as it was the contract sued on, plaintiff's suit should be dismissed. I am unable to accept this contention. It is true that Cls. 10 and 11 of Ex. A, which provide that if the market price declines prior to selling sellers should have the option of requiring the buyer to deposit the margin between the contract price and the market price of the day within 24 hours and that should buyers fail to appear to take delivery ex-hopper sellers were to have the right of cancelling the contract and claiming the difference between the sale and the market price of the day on which the rice was to have been milled, signify in my opinion a reciprocal promise on the part of the seller to give and on the part of the buyer to accept delivery, and that any evidence of a verbal agreement that the seller should not have the option referred to in Cl, 10, or the right to compel buyers to pay the difference referred to in Cl. 11, cannot be proved by the plaintiff being excluded by S. 92, Evidence Act, as being terms inconsistent with and repugnant to ths written contract. But so far as I can see plaintiff's cause of action is simply and solely defendant's failure to give delivery. He might have accepted the position created by S. 92 and relied solely on Ex. A, and left defendant to prove, as the defendant was entitled to do under proviso 1 to the same section, the other facts and circumstances which would show that the ostensibly good contract contained in Ex. A was void as a wagering contract and that the document was therefore invalidated.

So far as I can see plaintiff did sue on Ex. A. He annexed it to his plaint and filed it, thereby complying with the provisions of Civil Procedure Code, O. 7, R. 14, with regard to documents on which he sued. Other documents on which he relied he specified in a list,

again complying with the provisions of the same rule with regard to the documents relied on, as distinct from those sued on.

He has proved his contract, he has proved his demand for delivery and he has proved the defendant's failure to comply with this demand. It is either an honest contract or void as a wager by reason of circumstances which it was for defendant to allege and prove. I think paras. 4, 5 and 6 of his plaint need not have been pleaded and were pleaded owing to an unnecessary sense of candour and a desire not to lay himself open to the imputation that he had concealed anything from the Court. If he had not pleaded these facts, defendant would have had to assert them in order to show that it was a wagering contract, and not a mere ordinary contract, and did so.

Thus he says in his examination in chief: "As regards teji contracts I signed sold notes, as regards mandi I signed bought notes. In ordinary contracts it is usual to sign in two documents—sold and bought notes. In ordinary contracts no party deposits any money at the time of execution. In teji I would take Rs. 100 on 1,000 bags. Both parties fix a certain rate, say Rs. 325. If the market goes above Rs. 325 then the party who has received this Rs. 100 has to pay the difference (here lies the main contest between the parties) between the contract rate and the market rate. If during the month when the contract falls due, the market falls below that rate neither party pays anything unless the rate subsequently goes up (beyond the teji rate)." Here we have the essential features of the actual agreement, viz., that in consideration of a payment of Rs. 100 the common form of reciprocal contract evidenced by Ex. A was restricted and confined so that it became unilateral, the vendor alone being bound. It was urged that the plaintiff had brought himself within the principles laid down by the appellate Court in *Christensen* v. *Suthia* (1) and the Privy Council cases there cited which decided that it is absolutely necessary that the determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made; but so far as I can see this principle is not violated. That the defendant bound himself to deliver certain rice in a certain month at a certain price and that he failed to do so though called upon are facts set out in the pleadings and are the very facts on which the plaintiff bases his claim and these and only these actually occurred.

Supposing the market had fallen below the teji rate and the defendant relying on Ex. A had tendered the rice and demanded payment, then it is possible that in a suit brought by the defendant upon Ex. A for the price, the present plaintiff might have found himself precluded by S. 92, Evidence Act, from proving that he was not bound to take delivery. But this is not what happened, the market did not fall and the defendant did not call upon the plaintiff to take delivery, on the contrary the market rose and the plaintiff called upon the defendant to give delivery. These are the circumstances which gave the plaintiff his cause of action and these are set out in the pleadings and if the plaintiff had pleaded then and there only what I think he would have been entitled to do, the present contention would not, I think, have been raised. So far as the plaintiff is concerned, the other facts are surplusage as weapons of attack, though for the defendant they are vital as weapons of defence.

With regard to the defence on the merits, the defendant, after attempting to prove in the earlier part of the examination that no delivery in kind was ever intended or given, but only a payment of the difference between the teji and the market rate, was forced to admit that in all previous teji contracts with the plaintiff for delivery prior to July, he had invariably delivered milling notices, and never paid differences between the contract and the market rate. He is forced to admit it first in one contract and then in another, and finally he has said: "Exs. E, H, J, M, O, P, Q and R were eight contracts which I had with the plaintiff for delivery in the period previous to July 1911. These were the only teji contracts which I had with the plaintiff. In every one of these eight contracts I have delivered a milling notice and I have paid or received difference, i. e., profit or loss calculated on my contract with some previous person." Now if delivery of a milling notice is

(1) [1908] 2 Bur. L. T. 100.

tantamount to a delivery of goods, these differences will represent the actual profit and loss on an actual completed contract to deliver goods, and plaintiff's position will be considerably stronger than if there was no delivery but a mere payment of differences between the teji and the market rate. Before considering this question however it may be pointed out that these contracts, though made before were performed after the contract in suit was entered into, and that their probative value as to the intention of the parties at the date of entering into the contract in suit is lessened, but at p. 41 the defendant says: "In the teji contracts of 1910 likewise I delivered milling notices or paid differences or gave both together. When I talk of a difference with the milling notices I mean the difference between the rate at which I purchased from anyone and the rate at which I sold under the milling notices" and again at p. 25 he says: "In all my teji contracts in which I have settled my losses I satisfied some by payment of the difference and delivery of the milling notices," and he says the same with regard to his teji contracts with others such as Hirji Oomersy and Dhunji Dewacaran (vide p. 40 of his evidence.) He clings desperately to his statement that in some he paid differences only. But I do not recollect that he produced a single instance to that effect, and I am convinced that the practice and intentions of the parties were that the holder of the option should if the market rose call for and that the other party (the teji eater) should give delivery of milling notices. I must also hold that in the rice trade the delivery of a milling notice is considered to be tantamount and equivalent to the delivery of the actual rice.

Passing on the milling notice (says the defendant at p. 7) is the delivery. First the milling notice is passed and then when the goods are milled the delivery order comes up. "When I receive delivery under an ordinary contract first I get the milling notice"; and again at p. 8 he says: "When I get a milling notice I take it that I am in possession of goods, and when I pass it on to another I take it that another man is in the possession of the delivery." It was quite immaterial to him whether he got a milling notice direct from the mill or whether he got from a third party, vide p. 42 where he says: "When I delivered a milling notice I did not brother myself whether it was got from a mill or from outside," and a milling notice which he had accepted as performance of an ordinary contract i. e., a contract (to take his own words at p. 7) in which the original intention was as for as possible to give or take delivery he would pass on by way of performance of teji contract, vide p. 24, where he says: "What I purchased at Rs. 325-8-0 was under an ordinary contract. I passed the milling notices to the plaintiff under a teji contract at Rs. 310." The procedure in fact seems to be as follows: The millers contract to mill and sell so much rice to *A*, and when they are ready to mill the paddy they send him a milling notice, stating the day and the hour when they intend to commence milling, so that he may attend and see the operations and object, if he wishes, to the quality of the rice turned out. After the rice is milled he looses this chance and the millers send their purchaser a delivery order and on payment the rice is delivered. If in the meantime the purchaser has re sold, he will deliver the milling notice to his purchaser and will pay or receive the difference between the price at which he has bought from the mill and that at which he has re sold.

The milling notice may pass through numerous hands at various prices and a broker is employed to ascertain and collect or pay what each purchaser has to pay or receive; but as defendant says at p. 43: "Any one of the fifty (i. e., if it has passed through 50 hands) can keep the milling notice and take delivery of the rice and eat it, but he will have to pay the mill and get the rice milled," i. e., if he has bought at Rs. 300 and the mill has sold at Rs. 325, he will receive from the broker Rs. 25 on behalf of his vendor and get the rice by a payment of Rs. 325 plus the ordinary fixed charges for gunnies, etc. Is this a wagering contract? The milling notice is only a piece of paper and, as defendant says at p. 43: "It is always possible to effect a sale or purchase of rice in the Rangoon market," and as this sale or purchase is symbolized and considered to have been effected by the delivery or acceptance of this piece of paper, it follows

that it is equivalent to money and that a man may go in for the largest speculations without ever intending to take delivery of any of the actual commodity but only to sell the rights evidenced by the paper and receive his profits or pay his loss. If such was the intention of the parties, there can, I think, be no doubt but that on the principle laid down by the Privy Council in *Kong Yee Lone and Co.* v. *Lowjee Nanjee* (2) the transaction would be regarded as a wager. But the onus lies upon the defendant to prove it; and has he succeeded? Defendant admits that at the time he was doing a large rice business and admits that the plaintiff was a genuine shipper doing a large commission business in rice and also business in rice on his own account, and, so far as I can see, never showed that the plaintiff never took actual delivery under his teji contract, but always passed them on. Nor can I see that it would have helped him if he had done so, seeing that he was undoubtedly doing a large bona fide business in rice at the time, for what was said of delivery orders by Beaman, J., in *Mathuradas Gokuldas & Co.* v. *Narbadashankar Harjivan* (3) may equally well in my opinion be said in Rangoon of milling notices, namely, that though the mere giving and taking of a delivery order may be a device in use amongst gamblers to evade the law, yet on the face of it it is a regular business method and as effective as taking the goods away and putting them in your own godown. Nor can I see on the authorities that it makes any difference that he only purchased from the defendant a right to call for the delivery of the specified quantity of rice. The law of England and of India as regards wagering has been declared to be the same by the Privy Council in *Kong Yee Lone's* case (2), already cited and in *Buitenlandsche Bankvereeniging* v. *Hildesheim* (4) the Court of appeal held that the purchase of an option or right to call for shares was not necessarily a wagering contract, but that the same test, namely, as to whether differences only were intended to be paid, must be applied. They held that in the contract in question this was not the case, but "that it was a bargain for good consideration for the right to call for so many shares—like a bargain for the right to call for so many tons of iron at a certain price on a certain day." In *Tod* v. *Lakhmidas Purshotamdas* (5) Farran, J., laid it down that contracts were not wagering contracts unless it was the intention of both parties at the time of entering into the contracts under no circumstances to call for or give delivery from or to each other. This rule, though regarded by Batchelor, J., as being perhaps too broadly expressed in *Motilal* v. *Govindram* (6), has been restated with approval by Beaman, J., in the later case of *Mathuradas Gokuldas & Co. Narbadashanker Harjivan* (3). Whether it is or is not too broadly expressed seems to me immaterial in the present case, where, so far as I can see, the defendant's intention when he entered into this contract was to perform it, if called on to do so, by passing on a milling notice and paying or receiving the difference between the price at which he had brought and that at which he had sold, and while the plaintiff's intention is not shown to have been other than to demand the milling notice if the state of the market rendered it profitable to him to do so, and use it either to obtain rice himself or to enable him by passing it on to perform another bona fide contract.

Lastly it was shown that it was the plaintiff's practice followed in the transaction in suit to enter on the same day into a mandi contract whereby he obtained an option to sell the same quantity of rice deliverable in the same month at a very much lower rate, viz., Rs. 285 per hundred baskets. The effect of the double option was that if the market fell below Rs. 285 he would sell, and if it rose above Rs. 325 he would buy. The defendant admitted that he had entered into many mandi contracts and that his intention was to perform his mundi contracts if called on in the same manner as his teji contracts, but that the market never having fallen below the mandi rate he had never been called on to take delivery. Plaintiff thus obtained a double option. It was argued that if these were genuine con-

(2) [1902] 29 Cal. 461=28 I. A. 239=3 Bom. L. R. 476 (P. C.).
(3) [1909] 4 I. C. 99.
(4) [1903] 19 T. L. R. 641.
(5) [1892] 16 Bom. 441.
(6) [1906] 30 Bom. 83=7 Bom. L. R. 385.

tracts he must lose as he had contracted to buy for Rs. 325 and sell at Rs. 285, but the argument loses sight of the fact that it was an option. In my opinion a double option is no more necessarily a gamble than a single option. It may be one, as it may be an attempt to provide against the fluctuations of the market and to enable the holder to perform his other contract. Farran, J.'s dictum in *Tod* v. *Lakhmidas Purshotamdas* (5), that a contract is not a wagering contract unless neither of the parties intended under any circumstances to give or take delivery, seems to me to represent the law, though personally I should prefer to say that a contract cannot be proved to be a wagering contract unless it be proved that neither of the parties intended under any circumstances to give or take delivery. The delivery however must be a genuine delivery, and not a mere sham, not merely the delivery, of a piece of paper which was never to to be transformed into the actual delivery of goods. In *Kong Yee Lones's* case (2) the transactions in question were so out of proportion to the genuine commercial resources of the parties that the Privy Council held them to be wagers, but here each was doing such a large legitimate business that I am unable to hold the test applicable to this particular case. I am unable to hold it proved that the plaintiff did not intend to take, and that the defendant did not intend, if called on to give a perfect genuine delivery. He therefore fails in my opinion to show that the contract was a wagering contract and the plaintiff must have a decree calculated on the difference between the contract rate of Rs. 325 per 100 baskets and Rs. 390 per 100 baskets, this being the agreed settlement rate, for August 1911, namely, Rs. 19,500, with costs and advocate's fees of ten gold mohurs for the first and eight for each subsequent day.

K.N./R.K. *Suit decreed.*

A. I. R. 1914 Lower Burma 189

FOX, C. J. AND HARTNOLL, J.

Padashin and *another*—Plaintiffs—Appellants.

v.

Maung Lun and *another*—Defendants—Respondents.

First appeal No. 37 of 1905, Decided on 23rd April 1907.

(a) Malicious Prosecution—Ingredients to be proved stated.

In a suit for damages for malicious prosecution the plaintiff must prove the following four things :

(1) that he was innocent of the crime alleged against him ;

(2) that his innocence has been pronounced by a competent tribunal ;

(3) that there was a want of reasonable and probable cause for the prosecution ; and

(4) that the proceedings against him had been initiated in a malicious spirit. [P 189 C 2]

(b) Malicious Prosecution—Plaintiff's conviction in first Court is fatal to suit for damages.

A conviction in the lower Court of the plaintiff to a suit for damages for malicious prosecution although reversed on appeal is fatal to his suit for malicious prosecution save in very exceptional circumstances. [P 190 C 1]

Palit—for Appellants.

Dantra—for Respondents.

Fox, C. J.—The plaintiffs had been convicted by the First Class Magistrate of Kungyangon of obtaining the defendants' property by cheating. Upon appeal to the Sessions Court they were acquitted. They then brought the suit out of which this appeal arises for damages for malicious prosecution.

They had to prove: first, that they were innocent of the crime alleged against them; secondly, that their innocence had been pronounced by a competent tribunal; thirdly, that there was a want of reasonable and probable cause for the prosecution, or that the circumstances of the case were such as to be in the eyes of the Court inconsistent with the existence for reasonable and probable cause and fourthly, that the proceedings against them had been initiated in a malicious spirit, that is, from an indirect motive and not in furtherance of justice. If they failed to prove any one of these matters their case failed : see *Abrath* v. *N. E. Ry. Company* (1). The plaintiffs proved to my mind only the second of these matters conclusively. Possibly it may also be said that they should also prove the first, for even if they had

(1) [1886] 11 A. C. 247=55 L. J. Q. B. 457=55 L. T. 63=50 J. P. 659.

done all that the complainant said they had done, they were not liable to be convicted of cheating and of obtaining property by cheating. They however in my opinion, entirely failed to prove the other two requisites for succeeding in their suit. The whole matter turns upon whether the allegation which defendant 1 had made against them, that he had paid them Rs. 4,800 as an advance in part payment of paddy which they had sold to him was utterly without foundation and false. The Magistrate believed that he had paid them the money, and convicted them. Uuon the ruling in *Soobramony Pillay Chetty* v. *Maung Po Lu* (2), this conviction would be fatal to the plaintiffs' case. Without going as far as adopting the ruling in that case, which I think goes too far, and adopting the rules as stated by Mr. Pollcck in S. 42 of his draft of a Civil Wrongs Bill viz., "that an action will lie if the plaintiff was ultimately acquitted on appeal by reason of the original conviction having proceeded on evidence known by the complainant to be false or on the wilful suppression by him of material information," the plaintiffs have, in my judgment, failed to establish that defendant 1's prosecution of them was without reasonable and probable cause, and that it was malicious.

The District Judge has dealt with the facts and evidence very fully and carefully. It is unnecessary to repeat them.

There is, first of all, the great improbability of a man in defendant 1's position making the allegations he did without any foundation for them, and knowing, as he must have known, that he had not the strongest proof in the shape of a signed receipt that he had paid the Rs. 4,800. The weakness of the evidence for the plaintiffs strengthens the belief that defendant 1 did pay them the money.

It is a case in which two Judges who saw and heard the witnesses believed defendant 1 and his witnesses. There is, in my opinion, no ground for holding. that the District Judge's view was wrong As against defendant 2 there was no substantial case, and the Judge was, I think, right in awarding separate costs. I would dismiss the appeal with costs.

Hartnoll, J.—I concur.

K.N./R.K. *Appeal dismissed.*

(2) [1903-04] 2 L. B. R. 111.

A. I. R. 1914 Lower Burma 190

HARTNOLL, OFFG. C. J. AND ORMOND, J.

L. D. Attaides—Appellant.

v.

R. M. K. Chetty—Respondent.

Civil Misc. Appeal No. 109 of 1913, Decided on 27th January 1914, from order of Dist. Judge, Bassein, D/- 14th May 1913, in Civil Reg. No. 17 of 1911.

Civil P. C. (5 of 1908), O. 21, R. 89—Sale set aside under R. 89—Decree-holder is entitled to amount due on date of deposit by purchaser.

Upon a sale being set aside under O. 21, R. 89, the decree-holder is only entitled to what was due to him under the decree on the date of payment into Court by the auction purchaser.

[P 190 C 2]

Lentaigne (Jr.)—for Appellant.

Ormiston—for Respondent.

Hartnoll, Offg. C. J.—The defendant-appellant is a mortgagor against whom a final order for sale in pursuance of a mortgage decree was passed on 3rd August 1912. On 19th February 1913, the sale took place, and the purchaser paid into Court 25 per cent. of the purchase money. The balance of the purchase money was paid in by 5th March. The appellant obtained leave to set aside the sale under O. 21, R. 89, and on 24th March he paid into Court Rs. 83,421-4-6 being the amount due to the plaintiff-mortgagee on 5th March and 5 per cent. on the purchase money for payment to the purchaser. The District Judge ordered him to pay interest on the amount due to the mortgagee not only up to 5th March, but up to 24th, the date the appellant paid in the Rs. 83,421-4-6. It is against that order the appellant now appeals. The plaintiff mortgagee was entitled to draw out the amount due to him under his mortgage decree on 5th March; and upon a sale being set aside under O. 21, R. 89, the decree-holder was not entitled to more than was due to him under the decree. We think therefore that the order appealed against was wrong, and set aside so such of the order as directs interest to be paid after 5th March to the decree-holder. We allow an advocate's fee of two gold mohurs to the appellant in this appeal.

Ormond, J.—I concur.

K.N./R.K. *Order partly set aside.*

A. I. R. 1914 Lower Burma 191 (1)

ROBINSON, J.

Toola Ram—Defendant—Appellant.

v.

Abdul Gafur—Plaintiff—Respondent.

Second Appeal No. 212 of 1912, Decided on 5th February 1914, from judgment and decree of Dist. Judge, Toungoo, in Appeal No. 53 of 1912.

(a) Civil P. C. (5 of 1908), S. 73—Judgment debtor must fill in same character in both decrees.

Section 73 cannot be invoked unless the judgment-debtor occupies the same character in each decree. Where there is a decree against a judgment-debtor personally and another against him as heir, he is not the same judgment-debtor in the two decrees within the meaning of S. 73. [P 191 C 2]

(b) Civil P. C. (5 of 1908), S. 73—Some defendants are different—Rateable distribution can be allowed only to extent of their interest in both decrees.

Where there are several defendants in one decree and only some of them in another, rateable distribution may be allowed so far as the interests of those in both decrees are concerned. [P 191 C 2]

A. C. Dhar—for Appellant.

K. B. Banerji—for Respondent.

Judgment. — Appellant obtained a decree against one Butchia on 29th November 1911 and in execution attached and sold, on 28th January 1912, certain property: part of the purchase price was paid that day and the balance on 9th February 1912.

Respondent on 24th November 1912 obtained a decree against Kaja Mahomed and Butchia for a debt due by Butchia's deceased wife for which Kaja Mahomed had been surety. The decree was transferred to the same Court as that in which the property had been sold and respondent applied for a rateable distribution under S. 73, Civil P. C. It is now admitted that all the purchase-money not having been paid in, he was in time.

The sole remaining question argued was whether Butchia was the same judgment-debtor in both decrees. Mr. Dhar argues that in respondent's decree he was merely legal representative of his deceased wife.

Respondent's suit was brought after the woman's death and the plaint describes the defendants as Kaja Mahomed and Butchia. The decree is against Butchia and he is not described as legal representative. Mr. Dhar relies on *Bhola Nath* v. *Maqbul-un-nissa* (1). In this case a Mahomedan widow obtained a decree for her dower against the heir of her deceased husband and a creditor of the heir also obtained a decree against him. The creditor was held not entitled to the benefit of the provision of S. 295, now S. 73. "The decree obtained by the respondent is a decree against Yakub Hussain, as representative of her deceased husband whilst the decree obtained by the appellant is against Yakub Hussain in his personal capacity."

In *Govind Abaji Jakhadi* v. *Mohaniraj Vinayak Jakhadi* (2) Mohoniraj obtained a decree against Bhau Babaji who died shortly after. His son Kashinath was placed on the record as his legal representative and the property of deceased brought to sale. Meantime Govind Abaji obtained a decree against Kashinath as representative of Bhau Babaji and applied to be allowed to share rateably. The application was refused as the judgment debtors were not the same.

Where there are several defendants in one decree and only some of them in another, rateable distribution has been allowed so far as the interests of those in both decrees are concerned.

In the present case decrees are both against Butchia, but in the one it is against him personally and in the other it is as heir to his wife. It is the converse of the Allahabad case, but the authorities are all at one that the provisions of S. 73 cannot be invoked unless the judgment-debtor occupies the same character in each decree.

This being so, Butchia is not the same judgment-debtor in the two decrees within the meaning of S. 73.

I allow the appeal and dismiss plaintiff's suit with costs in all Courts.

K.N./R.K. *Appeal allowed.*

(1) [1903] 26 All. 28=(1903) A. W. N. 184.

(2) [1901] 25 Bom. 494=3 Bom. L. R. 407.

A. I. R. 1914 Lower Burma 191 (2)

TWOMEY AND ROBINSON, JJ.

P. L. K. Palaneappa Chetty—Defendant—Appellant.

v.

R. M. A. R. Arunachellam Chetty—Plaintiff—Respondent.

First Appeal No. 156 of 1911, Decided on 6th February 1914, against judgment and decree of Dist., Judge, Pegu, D/- 29th May 1911.

Civil P. C. (5 of 1908), O. 6, R. 14—Plaint for dissolution of partnership cannot be signed

by person holding power-of-attorney and carrying on firm's business—Principal must sign—Defect does not defeat decree.

A power enabling an agent to carry on the business of a firm shall not entitle him to sue for a dissolution of the firm. The proper course for the Court is to allow amendment of the plaint by requiring the principal himself to sign the plaint, since the defect does not go to the root of the case but is a mere irregularity which does not affect the merits and which would not justify the reversal of a decree on appeal.

[P 192 C 2]

Dantra—for Appellant.
Bilimoria—for Respondent.

Twomey, J. — The Chetty firm of R. M. A. R. consisted of two partners, Arunchellam Chetty who was senior partner with a 6/7ths share in the business and Palaneappa Chetty with a 1/7th share. The latter was also the agent of the firm at Tawa. Arunachellam gave his son Valliappa Chetty a power-of-attorney investing him with the usual powers of Chetty agents and also empowering him to dismiss other agents and take over the business from them and to sue them for on account. Under this power Valliappa filed a suit against Palaneappa alleging that the latter had refused to make over charge and to make over the moneys in his hands. He asked for an account to be taken and there was also a prayer that in the event of the Court holding that Palaneappa was a partner, the partnership should be dissolved and a receiver appointed. In the defendant Palaneappa's written statement it was contended that such a suit could not be maintained by Valliappa. The District Court dealt with the preliminary point in a separate order and held that as Palaneappa was one of the agents of the firm it was clearly the intention of Arunachellam in granting the power-of-attorney that Valliappa should, if necessary, sue for a dissolution of partnership. The suit then went on and as there was no dispute as to the facts a preliminary decree was granted declaring the shares of the two partners, ordering the dissolution of the partnership and the appointment of a receiver to get in outstandings and ordering also the appointment of a commissioner to take accounts.

The second ground of appeal is that the judgment is against law and the weight of evidence has been abandoned, and the appeal has been argued only on the ground that the District Court erred in holding that Valliappa Chetty had authority to file the suit.

It is clear that the power granted to Valliappa does not authorize a suit for dissolution. It is a power enabling him to carry on the business of the firm, but the carrying on of the business cannot be regarded as including the winding up of the business. The power authorized Valliappa to bring suits of various kinds against Palaneappa in his capacity as an agent, but the relief asked for—dissolution of partnership—is not relief which could be granted against him qua agent. I would therefore hold that the decision of the District Court on the preliminary point is erroneous. The question however remains whether the suit should therefore have been dismissed or whether the proper course in the circumstances was to allow time for the principal Arunachellam to sign the plaint himself or to give Valliappa the necessary power for signing it. In *Mootala & Co.* v. *Poonasawmy* (1) one of the two learned Judges (Fox, J.,) composing the Bench said that when a plaint has not been signed by a plaintiff himself, a Court must reject it unless it has been signed by an agent authorized by a power-of-attorney, either expressly or impliedly, to sign a plaint on behalf of the plaintiff. The question referred to the Bench in that case was whether persons carrying on business for and in the names of parties not resident within the local limits of the jurisdiction of the Court could sign and verify a plaint on behalf of those parties without being expressly authorized to do so and the answer to the reference was in the negative. Fox, J.'s opinion that the Court must reject the plaint outright appears to go beyond the terms of the reference. There was, no doubt, good reason in that case for holding that the plaint must be rejected for there was apparently no power-of-attorney at all, and as Irwin, J., pointed out it would be hard to subject a principal to the risk of being involved in litigation without his knowledge at the instance of an agent whom he has appointed merely for the purpose of carrying on a business and has not expressly authorized to institute suits. The circumstances of the present case are different. Valliappa had a

(1) [1903] 2 L. B. R. 41.

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power-of-attorney authorizing him to bring suits of various kinds against Palaneappa and from the circumstances of his case it seems very probable that Arunachellam did intend Valliappa to bring the suit which he actually brought. Arunachellam gave evidence fully avowing his agent's action in filing this particular suit. The right of the senior partner Arunachellam to sue Palaneappa for dissolution and an account of the partnership is not disputed. O. 6, R. 14 requires a plaint to be signed by the plaintiff or by a duly authorized person. As Valliappa's power-of-attorney was defective in not authorizing him to file a suit for dissolution he was not duly authorized by the plaintiff for the purpose of bringing such a suit and the plaint was therefore not signed as required by O. 6, R. 14. But it does not appear to follow that the plaint must be rejected. O. 7, R. 11, does not require a plaint to be rejected for such a defect and it appears to me that the Court has to decide in each case whether the failure to comply with O. 6, R. 14, is a defect which goes to the root of the case, or whether it is a mere irregularity whcih does not affect the merits and which would not justify the reversal of a decree on appeal (S. 99, Civil P. C.). This view is in accordance with that taken by the Allahabad High Court in *Basdeo* v. *John Smidt* (2) and by the Calcutta High Court in *Rakhal Chandra Tewary* v. *Secy. of State* (6). I think that in the present instance the defect in the plaint may properly be regarded as one of form only and that we would not interfere with the decree of the Court.

At the same time I think that when the defendant raised this objection the plaintiff-respondent should have asked leave to amend the plaint instead of persisting in his suit on the defective plaint. On this ground I would make no order as to costs of this appeal.

Robinson, J.—I concur.

K.N./R.K. *Order accordingly.*

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(2) [1899] 22 All. 55=(1899) A. W. N. 172.
(3) [1906] 10 C. W. N. 841.

A I. R. 1914 Lower Burma 193

FOX, C. J. AND PARLETT, J.

Yeo Kyew Sum—Appellant.

v.

U Ke Tu—Respondent.

First Appeal No. 11 of 1912, Decided on 3rd March 1913, from the judgment and decree of the Judge in Original Side, in Civil Regular No. 245 of 1912,

Buddhist Law (Burmese)—Ecclesiastical—Religious offering becomes irrevocable by mere declaration or delivery—Building built on monastery ground becomes ecclesiastical property.

A verbal declaration or delivery of possession renders a Buddhist religious offering irrevocable even without the formal dedication ceremony. [P 193 C 2]

A building erected on a Buddhist monastery ground with the permission of the presiding monk to be presented to him partakes of the nature of the ground on which it stands and becomes ecclesiastical properly. [P 194 C 1]

Parlett, J.—Plaintiff U Ke Tu is the presiding monk of a Buddhist monastery and the owner of the monastery and its precincts. Ma Thet, widow of Yeo Poon Yoke, obtained plaintiff's permission to erect a zayat on the monastery ground to be presented to him. Permission was given and a building was erected. In execution of a decree defendant attached the building as belonging to the estate of his judgment-debtor Yeo Poon Yoke, deceased. Plaintiff, having failed to get the attachment removed, filed this suit for a declaration that the building is his property and not that of the defendant's judgment-debtors, and obtained a decree against which defendant now appeals.

It is denied that plaintiff had possession of the building. It appears that it was kept locked and the key was in Ma Thet's custody, the reason being the necessity of protecting from theft the furniture and moveables kept in the building, and that plaintiff would have no occasion to enter it unless invited there for ceremonial purposes. It further appears that the formal dedication ceremony was not gone through before the attachment was effected, and it is urged that until dedication the property in the materials remained with the builder. For this proposition no authority has been cited. So far as I am aware a verbal declaration or delivery of possession renders a Buddhist religious offering irrevocable even without the formal dedication ceremony, and in

this view even the materials became religious property, when deposited in the plaintiff's monastery precincts with the intention of their being used for the building. There can be no doubt that permission to build was given only on the understanding that the building was to be plaintiff's property and that it would not have been given without such understanding. No authority has been quoted to contradict the view that by its erection in the circnmstances of this case, the building partook of the nature of the ground on which it stood and became ecclesiastical property and as such not liable to attachment in execution of defendant's decree. I would therefore dismiss this appeal.

Fox, C. J.—I concur.

K.N./R.K. *Appeal dismissed.*

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* A. I. R. 1914 Lower Burma 194

HARTNOLL AND ORMOND, JJ.

Sit Yin and *another*—Appellants.

v.

Ma Shin—Respondent.

Special Second Appeal No. 76 of 1913, Decided on 30th June 1914.

***(a) Lower Burma Towns and Village Lands Act (4 of 1898), S. 41—S. 41 does not bar civil Court's jurisdiction in suits for lands not held under grant or lease or license from Government and which is at its disposal—Suit where Government's rights are not to be decided can be entertained in civil Court.**

Where private persons litigate concerning claims to land not held under grant or lease from Government or under a license from the revenue officer, but which is at the disposal of Government, the jurisdiction of the civil Court is not barred by S. 41 (a). Under the said Act the eviction of a squatter by another squatter, or of a sublessee by a lessee is not a matter that is to be determined by the revenue authority, and there is nothing in the Act to oust the jurisdiction of the civil Courts in cases which do not involve the decision of any rights as against Government. [P 195 C 2 P 196 C 2]

***(b) Transfer of Property Act (4 of 1882), S. 108 (b)—Encroachment by lessee enures to benefit of lessor—Though Act not applicable principle is.**

The benefit of an encroachment by a lessee on a neighbour's land enures for the benefit of the lessor. [P 196 C 2]

Though S. 108 B (d), T. P. Act, is not in force in Wekema, the principle embodied therein should be followed:40 *Cal.* 931; *A. I. R.* 1914 *P C.* 140, *Dist.* [P 196 C 2]

Wiltshire—for Appellants.

J. N. Lentaigne—for Respondent.

Hartnoll, J.— The appellants bring a suit against respondent for ejectment from certain land. Their case is that they purchased certain house property from one Ma Hnit, the house property including the site on which the structures stand. They allege that at the time of the purchase Ma Shin was in possession of the property as tenant to Ma Hnit, and that Ma Shin refused to pay rent and set up antagonistic claims. Ma Shin's defence is that, as regards a portion of the property, at the time of appellant's purchase from Ma Hnit she had already purchased the same from Ma Hnit and that appellants had notice of the same—that appellant's purchase was therefore fraudulent and invalid; as regards the rest of the property she claimed that she owned it and that the site on which the structures stood never belonged to Ma Hnit who had no disposing power over it. Before appellants brought their suit, she had sued Ma Hnit for specific performance of the alleged contract with her. She brought her suit on 21st May 1910 and appellants brought theirs on 14th June 1910.

On 16th March 1912 Ma Shin's suit for specific performance was dismissed and on the same day the appellants were given the decree of eviction against respondent that they prayed for. During the pendency of the civil proceedings on 3rd March 1911 the Deputy Commissioner of Myaungmya cancelled the lease under which Ma Hnit held the property, exclusive of any extensions to it in her possession, for breach of conditions and said: "No action will be taken to evict the present occupants from possession provided that they apply for leases for the areas of which they are in occupation by 15th April." One of the breach of the conditions was the sale to appellants. On 12th May 1911 the appellants applied for a lease of the portion that they were in possession of and it was granted on 10th March 1913. Ma Hnit also applied on 12th May 1911 for a lease of the portion of land remaining with her and was granted such on 10th March 1913. In the meanwhile, on 21st December 1912, the Divisional Court dismissed the appeal of Ma Shin against the decree of the District Court refusing specific performance and the decree ordering her eviction on the ground that the jurisdiction of the civil Court was barred by S. 41 (a), Lower Burma Towns and Village Lands Act. This appeal is laid against the decree of the Divisional Court dismissing the ap-

pellants' suit asking for the eviction of Ma Shin. The first ground of appeal is that the Divisional Judge erred in holding that the civil Courts had no jurisdiction to decide appellants' claim. The Divisional Court relied on the cases of *J. Moment* v. *Secy. of State* (1) and *Maung Law* v. *Suppaya Padayachi* (2). S. 41 is as follows: "No civil Court shall have jurisdiction to determine (a) any matter which, under this Act, is to be determined by the revenue officer;

(b) any claim to any right over land as against the Government." The last part of it has been held to be ultra vires according to the Privy Council decision. *Secy. of State* v. *J. Moment* (3).

Looking at the case of *J. Moment* v. *Secy. of State* (1) it will be seen that the suit was one by the Secretary of State against Moment for possession and it was dismissed as it was held that both clauses of S. 41, Lower Burma Towns and Village Lands Act, were a bar to the suit. That part of the decision which held that the suit was barred by S. 41 (b) has been overruled. It remains to consider whether the remaining part of the decision which dealt with S. 41 (a) is applicable in the present case. The case of *J. Moment* v. *Secy. of State* (1) was one in which the Secretary of State sued Moment for possession and was not one where the litigation was between two private persons as in the present case. The point therefore whether S. 41 (a) would be applicable in the case of two private persons litigating was not considered. In the case of *Maung Law* v. *Suppaya Padayachi* (2) the learned Judge did not apparently notice the distinction. As regards the words of the judgment in the case of *Secy. of State* v. *J. Moment* (3) I am not at all sure that the learned Judges meant them to apply in all cases. Adamson, C. J., said: "S. 18 prescribes the method of recovering possession of State land." It would appear that in this passage the learned Judge was contemplating litigation between Government and another person. In view of the foregoing considerations and especially in view of the fact that the case was one of the Secretary of State proceeding against a private person I am of opinion that we are not precluded by the decision from considering whether S. 41 (a) bars the jurisdiction of the civil Court where those litigating are on both sides private persons litigating about the right to occupy land which is at the disposal of Government. S. 41, Cl. (a), is "any matter which under this Act, is to be determined by the revenue officer." I can find no words in the Act laying down that all disputes over land at the disposal of Government are to be determined by a revenue officer. There are in the Lower Burma Towns and Village Lands Act no provisions corresponding to S. 56 (a) read with S. 55, prov. 1, Burma Land and Revenue Act, 1876. In Ch. 5 Lower Burma Towns and Village Lands Act, I can find no provision that the only person who can evict from land at the disposal of Government is the revenue officer, and that no evictions can take place from such lands except by his order. Ss. 18, 19 and 20 only lay down liability to eviction. I would therefore hold that where private persons litigate concerning claims to land not held under grant or lease from Government or under a license from the revenue officer, but which is land at the disposal of Government, the jurisdiction of the civil Court is not barred by S. 41 (a) Lower Burma Towns and Village Lands Act.

In accordance with this finding we have heard the appeal on its merits. Ma Shin does not deny that the appellants have bought the land in dispute from Ma Hnit, but she pleads that previous to the doing so Ma Hnit agreed to sell her two of the rooms for Rs. 3,100, earnest-money to the extent of Rs. 600 being paid and that, though appellants knew of this agreement to sell, they never the less ignored it and made their own purchase. She also pleads that, as regards the remaining two rooms, the norththernmost ones, they never belonged to Ma Hnit and she had no right of disposal over them. As regards her first plea she brought a suit against Ma Hnit and the present appellants for specific performance of her alleged agreement with Ma Hnit. The suit was dismissed by the District Court on the merits. On appeal the Divisional Court dismissed it on the ground that the civil Court has no jurisdiction. The

(1) [1905-06] 3 L. B, R. 165.
(2) [1905-06] 3 L. B. R. 256.
(3) A. I. R. 1914 P. C. 140 = 40 Cal. 391 = 18 I. C. 22=40 I. A. 48=7 L. B. R. 10 (P.C.).

Divisional Judge also expressed his own opinion on the merits. The evidence taken in that suit was by consent admitted as evidence in the present case. The first point for consideration is whether there was an agreement for sale entered into by Ma Hnit and Ma Shin as alleged by Ma Shin. Both the District and Divisional Courts found in the other suit that Ma Shin did not prove that there was. On studying the evidence I have come to the same conclusion. To find that there was I must come to the conclusion that Ma Hnit is wrongfully retaining the Rs. 600 which Ma Shin says she paid as earnest money. Ma Hnit appears to be a respectable and aged lady; she also seems to be fairly well-to-do. I think it improbable that she would retain Ma Shin's Rs. 600. There were admittedly negotiatons between Ma Hnit and Ma Shin with regard to Ma Hnit's selling the property; but the evidence as to their exact nature is confiicting. Maung Shew Byaw, Ma Hnit's son, says that the Rs. 600 were taken and returned. There is evidence to show that the negotiations between Ma Hnit and Ma Shin fell through as Ma Hnit would not guarantee to bear any penalties the Government might impose on the owner of the property in respect of unauthorized erections on adjoining Government land. No apparent reason exists for disbelieving Po Twe in what he says in connexion with this matter. No receipt was ever given for the Rs. 600. Again there is no good reason apparent for disbelieving Po Saing, who was admittedly the writer of the conveyance conveying the property in dispute to the appellants. His evidence does not corroborate that of Po Shwe when the latter says that he went and protested against the sale, but it does corroborate that of Po Ko .who says that Po Shwe came to offer the Chinaman Rs. 1,500 in consideration of their not buying the house and of their allowing respondent to do so.

I am of opinion that Ma Shin has not proved her plea that there was an agreement for sale between her and Ma Hnit.

As regards the two northernmost rooms it appears that they were an extension made to the other two rooms and the panatchut by Ma Hnit's consent, the latter reducing the rent Rs. 10 in consequence. From the evidence it is not clear whether these extensions were made wholly or, partially on Ma Hnit's land, or on land at the disposal of Government: but this does not seem to me to affect the matter. Though S. 103-B (d), T. P. Act, is not in force in Wakema, it embodies a well-known principle of law that should be followed. If Ma Shin has encroached on Government land, such encroachment enures for the benefit of her lessor, Ma Hnit. She does not ask for compensation for the new erections, and it is clear that she has had her rent reduced Rs. 10 a month for a considerable time.

I would therefore set aside the decree of the Divisional Court and restore that of the District Court with costs to the appellants in all Courts.

Ormond, J.—We are not concerned with the dealings by Government, in connexion with the land in dispute since the institution of the suit. The case must be decided according to the circumstance in existence at the time of the suit. At that time, Ma Hnit's lease had not been cancelled; though, in my opinion, it is immaterial whether she ever had a lease from Government or not. There is nothing in the Lower Burma Towns and Village Lands Act to oust the jurisdiction of the civil Courts in this case. The eviction of a squatter by another squatter or of a sub-lessee by a lessee is not a matter that "is to be determined by the revenue authority;" and the case does not involve the decision of any rights as against Government. Ma Shin, the appellant, admits that she was the tenant as to the southern portion of the premises in dispute, of Ma Hnit, the plaintiffs' vendor; but she says she had agreed to buy this portion from Ma Hnit and had paid her Rs. 600 as part of the purchase money. Both the lower Courts have found that there was no such contract for sale and no such payment. My learned colleague has stated the facts and I concur in upholding such finding. As to the northern portion of the premises, it was an extension made by Ma Shin on Government land. She had no license or lease from Government; it was therefore an encroachment by a lessee on a neighbour's land and the benefit of such encroachment enures for the benefit of the lessor Ma Hnit. The plantiff's who

bought the premises from Ma Hnit, are therefore entitled to evict the respondent, Ma Shin, from the whole premises. I concur in the order proposed by my learned colleague.

K.N/.R.K. *Decree set aside.*

A. I. R. 1914 Lower Burma 197

ORMOND AND TWOMEY, JJ.

Emperor

v.

Kotiya—Accused.

Criminal Revision No. 92-B of 1914, Decided on 20th May 1914, from order of Sess. Judge, Tenasserim, dated 26th March 1914.

(a) Criminal P. C. (5 of 1898), S. 307—Opinions of Judge and jury and entire evidence can be considered.

On a reference under S. 307, tho High Court has all the powers of an appellate Court and should form its own opinion after considering the entire evidence giving weight to the opinion of the Sessions Judge and the jury: 22 *Cal.* 128 and 25 *Cal.* 852, *Foll.* [P 198 C 1]

(b) Penal Code (45 of 1860), Ss. 299, 300 and 304—Knowledge of probability of death when struck with sharp weapon on vital part should be presumed—But offence of murder cannot be held in every case.

If a person strikes another on a vital part with a cutting instrument the striker should be presumed to have intended to cause bodily injury sufficient in the ordinary course of nature to cause death; but it does not follow that the striker must be found guilty of murder: his act may fall under one of the exceptions to S. 300, I. P. C.: 2 *L. B. R.* 63, *Ref.* [P 197 C 2]

(c) Penal Code (45 of 1860), Ss. 299, 300 and 304—Question of knowledge does not arise when death is caused by direct injury—It is to be considered only to determine intention and not to determine if case falls under S. 304.

The parts of Ss. 299, 300, 304, I. P. C., dealing with "knowledge" are not applicable to a case in which bodily injury intended for a particular individual has resulted in death. Where a death has been caused by intentional bodily injury inflicted by the accused on the deceased, the question of what knowledge must be attributed to the accused comes in only "as a means of arriving at his intention when he committed the act and for that purpose, and not for the purpose of deciding whether the case falls within the last part of S. 304, must the question be considered:" 3 *L. B. R.* 122, *Ref.*

[P 197 C 2; P 198 C 1]

Ag. Govt. Advocate Mg. Kin—for the Crown.

De Glanville—for Accused.

Order.—Kotiya, a dhoby, was tried in the Tenasserim Sessions Court at Moulmein for murdering another dhoby named Jagganath by stabbing him in the abdomen with a knife. The jury found unanimously that the accused was guilty of the offence of culpable homicide not amounting to murder. The learned Sessions Judge disagreed with this verdict being of opinion that the facts constituted an offence under Cl. 3, S. 300, I. P. C., and he has accordingly submitted the case to this Court under S. 307, Criminal P. C. The ruling cited by the Session Judge, *Hamid* v. *King-Emperor* (1), no doubt supports the view that if a person strikes another in a vital part with a cutting instrument the striker should be presumed to have intended to cause bodily injury sufficient in the ordinary course of nature to cause death. But it does not necessarily follow that the striker must be found guilty of murder. His act may fall within one of the exceptions to S. 300. In the present case there was some evidence of the deceased following the accused and some evidence of a fight. It may well be that the jury came to the conclusion that there was some provocation to reduce the offence to culpable homicide not amounting to murder, and it was open to them on the evidence and on the Judge's summing up to bring in such a verdict.

It is therefore not easy to understand how the learned Judge came to the conclusion that it was in the words of S. 307, Criminal P. C., "necessary for the ends of justice" to make this reference, and it is to be regretted that he has not recorded the grounds of his opinion more fully. I note however that though the verdict of the jury does not specify whether the accused was found guilty under the first part of S. 304 or under the second part, the Judge has taken it as a verdict under the second part, and this is doubtless a correct view of the verdict, for the Judge's summing up presented only two alternatives to the jury if they should find that the accused was the man who stabbed the deceased. These alternatives were murder and culpable homicide not amounting to murder under the second part of S. 304. But I would point out that there was an error of law in this presentation of this case. For, as explained in *Shwe Ein* v. *King-Emperor* (2), the parts of Ss. 299, 300 and 304 of the Code dealing with "knowledge" are not applicable to a case in which bodily injury intended for a parti-

(1) [1903] 2 L. B. R. 63.
(2) [1905] 3 L. B. R. 122=3 Cr. L. J. 355.

cular individual has resulted in death. Where death has been caused by intentional bodily injury inflicted by the accused on the deceased, the question of what knowledge must be attributed to the accused comes in only as a means of arriving at his intention when he committed the act and for that purpose, and not for the purpose of deciding whether the case falls within the last part of S. 304, must the question be considered. It follows that the second of the two alternatives presented to the jury in this case should have been culpable homicide not amounting to murder under the first part and not under the second part of S. 304. There is no doubt I think as to the duty of the High Court in dealing with a case submitted under S. 307, Criminal P. C. Our attention has been drawn to the Calcutta cases, *Emperor* v. *Lyail* (3) and *Queen-Empress* v. *Pratab Chunder Ghose* (4), and I see no reason to dissent from the opinion there expressed by the learned Judges as to the scope of the section. It was held that on a reference such as this that the High Court has all the powers of an appellate Court and should form its own opinion after considering the entire evidence and giving due weight to the opinion of the Sessions Judge and the jury.

It is no doubt our duty to acquit the accused if we are not satisfied that the evidence is sufficient to establish his guilt. We are not bound to accept the opinion of the jury even if it is not shown to be perverse or manifestly wrong. (His Lordship after discussing the evidence in the case concluded as follows:) It remains to be decided whether we should hold the act of the accused to be murder or culpable homicide not amounting to murder. The accused was the aggressor and he used a knife against a man who was apparently unarmed. But it is clear that the deceased offered some provocation by following the accused into the next compound. There was a fight in the course of which the deceased was stabbed. In bringing in a verdict of the minor offence the jury no doubt took into consideration the admission of Miramma as to the fight, and the probability that Miramma and Jaggannath have not told the whole truth as to the nature and extent of the provocation offered by Jaggannath. In all the circumstances of the case I am not prepared to say that the jury took too lenient a view of the offence in not bringing in a verdict of guilty on the charge of murder.

I would therefore find that the accused Kotiya is guilty of the offence of culpable homicide not amounting to murder under the first part of S. 304, I. P. C. But the offence is not far removed from murder and I would sentence Kotiya to transportation for life, the maximum punishment provided for the offence of which he is convicted.

Ormond, J.—I concur.

K.N./R.K. *Order accordingly.*

(3) [1902] 29 Cal. 128=6 C. W. N. 253.
(4) [1898] 25 Cal. 852=2 C. W. *N.* 593.

A. I. R. 1914 Lower Burma 198

FOX, C. J.

Ma Tha and *others*—Defendants—Appellants.

v.

P. L. M. M. Chetty Firm—Plaintiffs—Respondents.

Second Appeal No. 99 of 1913, Decided on 13th November 1914.

(a) Civil P. C. (5 of 1908), S. 100—Decree not based on evidence—High Court can interfere.

Where the lower appellate Court gives a decree not based on evidence, it is a substantial defect or error in the procedure of that Court which entitles the High Court to interfere in second appeal: 17 *Cal.* 875 (*P. C.*), *Foll.* [P 200 C 1]

(b) Civil P. C. (5 of 1908), O. 6, R. 15—Court must see that plaints are properly signed and verified.

Judges are bound to see that plaints are signed by persons authorized to sign them and that verifications are not treated as mere formalities. [P 199 C 1]

(c) Civil P. C. (5 of 1908), O. 17, R. 3—Court should decide case on materials on record if parties fail to summon witness in time.

When parties do not get summones served on their witnesses in time for them to appear on the day of hearing, the Judge should proceed to deal with the case on the materials at the time before him. [P 199 C 1]

Anklesaria—for Appellants.

Chari—for Respondents.

Judgment.—The suit was for Rs. 950 due on a promissory note for Rs. 500, dated 20th November 1905, and was filed on 20th July 1910. It is prima facie time-barred, but two sums of interest were alleged to have been paid by the defendants, viz., Rs. 60 on 19th May 1906 and Rs. 50 on 21st July 1907, the latter of which saved the bar of limitation.

Much carelessness in procedure is displayed by the record. In the plaint, the plaintiff or plaintiffs is or are described as P. L. M. M. Muthayah Chetty, a firm carrying on business of money-lender in partnership at Pyapon by the managing partner Sattappah Chetty, residing in Dedaye now at Pyapon.

Sattappah Chetty was not examined at any stage of the case. He signed the plaint as "power holder" and he alone signed the verification which is as follows:

"We the plaintiffs declare that what is stated in the plaint paras. 1, 2, 3 are true to our knowledge and paras. 4 and 5 true to our belief." If this was correct, he must have been called as a witness, but he was not; he was not even called upon to produce the power-of-attorney which his signature betokened he held. Judges are bound to see that plaints are signed by persons authorized to sign them, and that verifications are not treated as mere formalities.

The promissory note sued on was not produced in Court until nearly eleven months after the suit was filed; this was another non-observance of prescribed procedure which should not have been allowed by the Judge if he had been careful. Many postponements and adjournments were allowed which should not have been allowed. Most of them were because witnesses had not appeared. When the parties had not taken the trouble to get summonses served on their witnesses in time for them to appear on the day of hearing, the Judge should have proceeded to deal with the case on the materials at the time before him. One long adjournment was granted to suit the convenience of the parties and witnesses and because the plaintiff, presumably Sattappah, was going to India on businsss. Three witnesses were examined for the plaintiff on 9th June 1911. One was examined as to the Burmese handwriting on the promissory note. He said that he did not think the handwriting and signature on the note were those of the male defendant; yet the note was admitted in evidence. The second witness knows nothing about the case. The third said he had made a translation from some account books produced before the Court. No one was called to say what these books were or whose they were, or whether they were books kept in the ordinary course of business, yet the translations were admitted in evidence. Another witness was examined on 1st November 1911. He spoke not to the execution of the promissory note, but to the later payment of interest. At the time of payment he was a clerk in another Chetty firm and had been shown the promissory note by the plaintiff's pleader shortly before he was called to give evidence. He professed to remember that the male defendant had written an endorsement on the note about the payment of the sum and that one of the female defendants had touched the pen. This man's evidence was obviously worthless.

On 1st November 1911, that is, nearly sixteen months after the suit was filed, a petition by one Chona Tamby, described as agent of P. L. M. M. Sattappa Chetty, was presented asking that a commission might be issued to Sivagunga District in Madras to take the evidence of P. L. M. M. Muthayah Chetty, the man who was alleged to have lent the money and taken the promissory note from the defendants, and of Murgappah Chetty, the man who wrote the note. Perhaps the strongest occurrence in the case is that the advocate for the defendants did not object to the issue of the commisssion at that stage. The promissory note was not sent with the commission. There is no record of its having left the Court and neither Muthayah nor Moorgappah in the evidence said that the defendants signed or in any other way executed this promissory note then before them. No evidence has been given in the case proving the execution by the defendants of the particular note sued upon entitling it to admission in evidence. Yet both Courts have given a decree for the amount sued for on it.

This very simple suit in the Subdivisional Court dragged on from 20th July 1910 until 14th May 1912 or for nearly two years. The Divisional Judge confirmed the decree of the Subdivisional Judge. The course of thought of the Divisional Judge in his consideration of the case is difficult to follow. Most of his remarks tend to a conclusion that the suit should be dismissed, but finally he dismissed the appeal on the ground that he considered forgery of the note unlikely. He did not deal directly with the second ground of appeal, which was

that the lower Court erred in holding that the plaintiff had discharged the burden lying on him of proving that the promissory note had been executed by the defendants.

The defendants have filed an appeal to this Court from the decree of the Divisional Court only on the limited grounds set out in S. 100. The defendants' pleader relies on those stated in Cl. (c), viz., "Substantial error or defect in the procedure provided by this Code or by any other law for the time being in force which may possibly have produced error or defect in the decision of the case on the merits." In my view there was no evidence given in the case which justified a Court in giving a decree for the amount due in the note, because execution of the note sued on was not spoken to or proved by anyone.

In *Hemanta Kumari Debi* v. *Brojendra Kishore Roy Chowdhry* (1) their Lordships of the Privy Council held that where the lower appellate Court had given a decree not based on evidence, this was a substantial error or defect in the procedure of that Court which entitled the High Court to interfere in second appeal under the provision in the Code of 1882 corresponding to S. 100 of the present Code. This view of the scope of the provision justifies me in holding that where, as in this case, there is absence of necessary evidence of execution of a document sued on and not admitted, Cl. (c), S. 100 of the Code justifies interference with the decrees of the lower Courts.

For these reasons I allow the appeal and reverse the decrees of both the lower Courts and dismiss the suit with costs.

The plaintiff firm must pay the defendants' costs in all the Courts.

K.N./R.K. *Appeal allowed.*

(1) [1890] 17 Cal. 875=17 I. A. 65 (P. C.).

A. I. R. 1914 Lower Burma 200

PARLETT, J.

Diekmann Brothers & Co. Ltd.—Plaintiff—Appellants.

v.

Sulaiman Hajee Brothers & Co.—Defendants—Respondents.

First Appeal No. 71 of 1912, Decided on 12th September 1913.

Transfer of Property Act (4 of 1882), Ss. 3 and 130—Benefit of contract but not burden can be assigned.

The benefit of a contract is, but burden is not, assignable by one party without the consent of the other. [P 201 C 1]

S. S. Patker—for Appellants.

J. R. Das—for Respondents.

Judgment.—The defendants in this case, who are millers, on 22nd September 1910 sold to Zaretsky Bock & Co. the whole produce of ricemeal from their mill for the season 1911 at Rs. 85 per 100 baskets of 45 pounds net, delivery to be taken ex hopper at seller's mill from 1st January 1911 to the end of 1911 season, date at seller's option and payment to be made in cash before any ricemeal was removed but not in any case later than immediately after milling and apparently as soon as 1,000 bags were bagged. On 10th August 1911 Zaretsky Bock & Co. endorsed this contract as transferred to the plaintiff firm and on the same day wrote to defendants informing them of the transfer and asked them to send bills in future to plaintiffs. There was no reply to this letter and on 2nd September 1911, the plaintiff firm wrote to them asking for a bill and delivery order in respect of about 1,000 bags which they believed them to have ready, and on 4th September defendants replied repudiating the transfer of the contract as it was made without their knowledge and consent. The plaintiffs' firm purchased 1,100 bags of ricemeal in the open market at Rs. 115 per 100 baskets of 45 pounds and have now sued the defendants for Rs. 1,320 damages suffered in the transaction. The principal point is whether the contract is assignable without the assent of the defendants, the sellers. A somewhat similar contract was held not to be assignable in *Tod* v. *Lakhmidas Purshotamdas* (1), and cogent reasons for the decision are set out in the judgment in that case. It is however pointed out that it was decided before the Transfer of Property Act came into force, and it is urged that this contract is an actionable claim as defined in S. 3 of that Act and can therefore be transferred under the provisions of Ch. 8. I doubt however whether until Zaretsky Bock & Co. claimed delivery on tender of payment and were refused, an actionable claim arose which they could transfer as such

(1) [1892] 16 Bom. 441.

to another party. The more recent cases of *Jaffer Meher Ali* v. *Budge Budge Jute Mills Co* (2) and *Nathu Gangaram* v. *Hansraj Morarji* (3) were decided after the Transfer of Property Act came into force and in neither was a contract similar to that involved in the present case considered to be transferable merely as an actionable claim. The principle there laid down is that the benefit of a contract for the purchase of goods as distinguished from the liability thereunder may be assigned, understanding by the term "benefit" the beneficial right or interest of a party under the contract and the right to sue to recover the benefits created thereby, provided that the benefit sought to be assigned is not coupled with any liability or obligation that the assignor is bound to perform.

It was expressly stated in the Calcutta case that, looking at the terms of the contract, it did not appear to impose any liability or obligation of a personal character on the assignor, which would prevent the operation of the rule of assignment, and I feel no doubt that the expression "of a personal character" referred to the obligation only and not to the liability, and that the decision was not intended to qualify the rule that, though the benefit of a contract may be assignable by one party, the burden is not so assignable without the consent of the other party. The House of Lords' case of *Tolhurst* v. *The Associated Portland Cement Manufacturers* (4) was referred to as an authority for this contract being assignable, but the decision in that case was arrived at on a consideration of the terms of the particular contract concerned and the assent of the Lord Chancellor to the opinion of the majority of the Judges was accorded, and that with hesitation, only in view of the length of duration of the contemplated contract, the persons engaged in it, and the nature of the contract itself, in none of which respects had it anything in common with the contract now under review. Looking at the contract in this case I think it clearly imposes liability on the purchasers such as would preclude their transferring it without the consent of the sellers. It contains the following clauses:

"10. If market price of above ricemeal declines prior to milling, sellers have the option of requiring buyers to deposit a margin between contract and market prices of the day within 24 hours.

"11. Should buyers fail to appear to take delivery ex hopper or as above, sellers to have the right of cancelling this contract and claiming on buyers for any difference in price between sale and market price of the day on which the rice meal was to have been milled.

"12. Sellers have the option of disposing of the ricemeal by public or private sale for buyers' account should they fail either to deposit margin as above or to pay for it as above within two days of the presentation of the bill."

These provisions, in my opinion, operate to render the contract not assignable without the seller's consent. The appeal is dismissed with costs.

K.N./R.K. *Appeal dismissed.*

(2) [1906] 33 Cal. 702=10 C. W. N. 755.
(3) [1907] 9 Bom. L. R. 114.
(4) [1903] A. C. 414=72 L. J. K. B. 834=89 L. T. 196=19 T. L. R. 677=52 W. R. 142.

A. I. R. 1914 Lower Burma 201

HARTNOLL, OFFG. C. J., AND YOUNG, J.

Maung Chit Maung—Appellant.

v.

Ma Yait and *another*—Respondents.

Civil Misc. Appeal No. 26 of 1913, Decided on 22nd August 1913, from order of Judge in Civil Misc. No. 182 of 1912, D/- 10th February 1913.

(a) Succession Act (10 of 1865), Ss. 331 and 332—Act does not apply to one professing to be Hindu though of mixed parentage.

Where an intestate professed the Hindu religion, though he was of a mixed parentage:

Held: that letters of administration should issue under the Probate and administration Act and not under the Succession Act. [P 202 C 2]

(b) Probate and Administration Act (5 of 1881), Ss. 41 and 23—Letters of adiministration should be granted to mother and daughter in preference to eldest son when she is trustee and other beneficiaries desire it.

Though under S. 23, letters of administration should ordinarily be issued only to an heir or heirs, S. 41 allows exceptions to be made in special cases. Where an intestate made a large settlement and appointed his wife and daughter to be its trustees and not his eldest son, and the other sons of the intestate desired that their mother and sister rather than their eldest brother should administer the estate, the Court held that letters were rightly granted to the wife and daughter of the deceased rather than to the eldest son. [P 202 C 2]

Giles—for Appellant.

Cowasji and *Banerii*—for Respondents.

Hartnoll, Offg. C. J.—Mah Yait has been given letters of administration to the estate of her deceased husband Maung Ohn Ghine. Her son, Maung Chit Maung, disputes her right to have them. It has not been settled whether letters should issue under the provisions of the Succession Act, 1865, or under the provisions of the Probate and Administration Act, 1881, as it has not been decided whether Maung Ohn Ghine was a Hindu within the meaning of S. 331, Succession Act. As a matter of fact, the record shows that letters have been issued in the form provided for the Probate and Administration Act. Maung Chit Maung contends that his father was a Hindu, that letters should be issued under the Probate and Administration Act in which case he would have first claim to them, a claim that should not be passed over in favour of another without adequate cause. Mah Yait contends on the other hand that her deceased husband was not a Hindu within the meaning of S. 331, Succession Act, and therefore that that Act applies to his estate.

Maung Ohn Ghine is described by Mah Yait as being a member of the community of mixed Hindu and Burmese descent known as Kalas, professing the Hindu religion. She describes Kalas as the descendants of Hindu settlers by Burmese women and says that U Ohn Ghine and all the members of the community also worshipped at the Pagoda, fed the Hpoongyis, and observed Buddhist fasts and festivals.

I think that it must be definitely decided as to which Act is applicable. If Maung Ohn Ghine was a Hindu, S. 150, Probate and Administration Act, renders it imperative that that Act should be applied to the administration of his estate. If he was not, S. 2 read with S. 331, Succession Act, equally renders it imperative that this latter Act should be applied to the adminstration of his estate. The powers of an administrator are different under the two Acts. The rules as to succession are different according to Hindu law and according to the Succession Act. If the admininstrator has letters under the Indian Succession Act, the estate must be divided according to the rules laid down in it; if the letters are under the Probate and Administration Act, the distribution must be in the present case according to the rule of Hindu law. No authorities were quoted at the hearing as to which Act was applicable in the case. But it was contended by respondent's counsel that Maung Ohn Ghine cannot be held to be a Hindu within the meaning of the two Acts inasmuch as he was not a pure Hindu by birth; that as his paternal ancestor, who was a Hindu, cohabited with a Burman Buddhist, the issue of that union and their descendants ceased to be Hindus; and that persons can profess to be Hindus and yet be outside the pale of Hinduism. The subject was discussed in the case of *Dagree* v. *Pacotti San Jao* (1), and I can see no good reason for differing from the reasoning followed in that case. I would follow it, and in that it is admitted by Mah Yait that Maung Ohn Ghine professed the Hindu religion; I would rule that the Probate and Administration Act (5 of 1881) applies to his estate and that the letters issued to administer it must be held to be issued under the provisions of that Act.

The next point to be considered is whether in view of this decision Maung Chit Maung should not be preferred to his mother Mah Yait. According to S. 23, Probate and Administration Act, the ordinary rule is that letters should issue to any person, who according to the rules of the administration of the estate of an intestate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate. But S. 41 of the Act allows an exception to be made. In the ordinary course, Maung Chit Maung should be given the letters; but Mah Yait objects to his having them on the ground that he forfeited Maung Ohn Ghine's confidence and that he has been foolish and extravagant. He on the other hand, urges that his mother should not have them as she is trustee under a settlement that was made by Maung Ohn Ghine which is invalid according to Hindu law and that, if she is administratrix, she will not take measures to have it set aside. It is a fact that he was not appointed a trustee of the settlement by his father and this goes to support Mah Yait's allegations against him. The other two adult sons, Maung Maung and Maung Aye Maung, wish their mother and sister to administer the estate and not Maung Chit Maung.

(1) [1895] 19 Bom. 783.

Statements made by them in England have been filed to this effect. The learned Judge on the original side has noted that Mah Yait is supported by all the members of the family except Maung Chit Maung. Under the circumstances therefore I see no good reason for withdrawing the letters from Mah Yait.

I would therefore dismiss the appeal, but in doing so, would expressly rule that the letters are granted under the provisions of the Probate and Administration Act, and that Act will govern the administration of the estate. I would also order that the costs of both parties to this appeal shall come out of the estate. I would allow to each party a counsel's fee of two gold mohurs.

Young, J.—This is an appeal from a decision of the learned Judge on the original side granting letters of administration of the estate of the late Maung Ohn Ghine to one Mah Yait, his widow.

The main grounds of appeal are that the learned Judge should have decided whether the applications for letters were to be dealt with under the Succession Act or under the Probate and Administration Act, and should have decided that he was a Hindu and that the administration of his estate was governed by Hindu law and the Probate and Administration Act, and should have held that the appellant who is the intestate's eldest son had the best right to administer the estate. The respondent urged that the deceased was not a Hindu in the strict sense, that the Succession Act applied and that under it the widow had the preferential claim.

The respondent's contention that Maung Ohn Ghine was not a Hindu in the strict sense has to be considered in the light of her own affidavit which states that he professed the Hindu religion. S. 331, Succession Act, provides that that Act shall not apply to the property of any Hindu, Mahomedan or Buddhist, and it has been repeatedly held both in Bombay and Madras that the term "Hindu" as then used is denominative of a religion and not of a race: vide *Dagree* v. *Pacotti San Jao* (1), and cases there cited. S. 2, Probate and Administration Act, provides that Chs. 2—13 of that Act shall apply to all Hindus, Mahomedans and Buddhists dying after 1st April 1881. The term "Hindu" must obviously be given the same construction in each Act and, therefore on respondent's own affidavit, I would hold that the Probate and Administration Act applied and not the Succession Act. If this Act applies letters under S. 23 may be given to any person who, according to the rules for the distribution of the estate of an intestate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate, and when several such apply it is the discretion of the Court to grant it to anyone or more of such persons. The applicants were the widow and a daughter of the deceased on the one hand and the eldest son on the other.

In my opinion according to the ordinary principles of Hindu law a widow, where there are sons, is entitled to maintenance during her life and a daughter under the same circumstance to maintenance till her marriage out of the estate, but neither can, I think be said to be entitled to the estate or any part of it within the meaning of S. 23.

The widow states that her husband was of mixed Burmese and Hindu descent and was a member of a community called Kalas, which, according to her, has heretofore not followed any fixed law of inheritance but in which the children divide the property (which, in other cases, has been small) as they think best. Succession amongst Hindus is intimately connected with religion, but it may be that a custom at variance with the ordinary rules of succession might be proved. Even if it were proved however it seems that under it she, as widow has to depend on the children's sense of duty, and is not entitled as widow to a share of the estate so as to enable the Court to exercise a discretion in her favour under S. 23, which apparently refers only to persons entitled to share. S. 41 however provides that the person who would ordinarily be entitled may be superseded where such a course appears to the Court to be convenient and I cannot shut my eyes to the facts that the intestate in his lifetime made a settlement of his property which was not only large in itself but was large in proportion to the rest of his property, and that he selected his wife and daughter to be trustees to manage such settlement but not his eldest son, and that all the other mem-

bers of the family desire that she and not he should administer the residue. Her affidavit in respect of his unfitness is not so specific as it should be, but he is very young and there certainly seems reason to question his fitness and capacity. The section in question is wider than the analogous section of the English Probate Act 1857, and on the whole I see no reason to set aside the order of the lower Court, though for the reasons already stated I consider that letters should issue expressly under the Probate and Administration Act.

I also concur in the order as regards costs.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Lower Burma 204

PARLETT, J.

Ma Ngwe Yin—Defendant—Appellant.

v.

Maung Po Taw—Plaintiff — Respondent.

Second Appeal No. 224 of 1911, Decided on 3rd April 1913.

Contract — Marriage —Breach of—Damages—Man can sue and get damages for breach of contract of marriage—Plaintiff must prove actual damage—Becoming a butt of acquaintances' jest or feeling shame is no injury.

Damages for the breach of a contract of marriage may be awarded to a man : 21 *Bom.* 23, *Foll.*

Between Burman Buddhists a suit by the man will lie, unless it can be shown to be forbidden by the Burmese Buddhist law: *S.J.* 533, *Foll.* [P 204 C 2]

The respondent sued appellant for damages valued at Rs. 200 for breach of contract of marriage and was awarded Rs. 30—Rs. 13 being loss incurred by him over purchase of furniture for the marriage and Rs. 17 for injury to his reputation in public. Both sides appealed and the District Court increased the damages to Rs. 20 for the furniture and Rs. 30 for injury to his social standing and reputation. The defendant on second appeal urged, inter alia that there was no evidence of actual loss over the furniture or of actual damage owing to alteration of his social condition or reputation:

Held: that there was no evidence of actual loss having been sustained by reason of the purchase of the furniture, much less of what the amount of that loss was, and that therefore there was nothing to base the finding of either Rs. 13 or Rs. 30 upon.

Held also: that there was nothing on the record to indicate that the plaintiff had suffered injury either to his social standing or to his reputation, nor any evidence indicating any measure of damages for such injury.

Held further: that the fact that a man had merely become the butt of his acquaintances' jests, or had experienced a feeling of shame, did not constitute an injury for which damages could be awarded in a suit of this nature. [P 205 C 1]

Maung Thin—for Appellant.

Tha Din—for Respondent.

Judgment.—Respondent sued appellant for damages for Rs. 200 for breach of contract of marriage and was awarded Rs. 30—Rs. 13 being loss incurred by him over purchase of furniture for the marriage and Rs. 17 for "injury to his reputation in public." Both sides appealed, and the District Court increased damages to Rs. 20 for the furniture and Rs. 30 for "injury to his social standing and his reputation." The defendant now appeals on the grounds: (1) that the suit did not lie, and (2) that there was no evidence of actual loss over the furniture or of actual damage owing to alteration of his social condition or reputation.

The case of *Purshotamdas Tribhovandas* v. *Purshotamdas Mangaldas* (1) is authority for damages for breach of a contract of marriage being awarded to a man, and as the District Court points out, the ruling of *Maung Hming* v. *Ma Pwa Me* (2) is authority that between Burman Buddhists a suit by the man will lie unless it can be shown to be forbidden by the Burmese Buddhist law. S. 63, Vol. 2, of the late Kin Wun Mingyi's Digest was quoted as forbidding such a suit. In my opinion that section deals with only the particular circumstances therein set forth. S. 74 appears to be direct authority that under other circumstances such a suit might lie.

I consider however that the second ground is one of substance. As regards the furniture the facts found by both Courts are that in consequence of appellant's promise to marry him respondent bought furniture and household effects to the value of some Rs. 128 which apparently he still has. One witnesss only says that no Burman Buddhist would take them off his hands as they would be regarded as unlucky. The respondent never alleged this, nor did he either in his plaint or in his evidence claim to have suffered actual loss over the purchase of these articles. There is no evidence whatever that he has made any attempt to resell any of them, or what amount he would be likely to realize for them from a person not a

(1) [1897] 21 Bom. 23.

(2) S. J. 533.

Burman Buddhist, or otherwise averse to buying them; nor is there any evidence that some if not all the articles are not such as to be of use to himself. Thus it cannot be said that there is any evidence at all of actual loss having been sustained by reason of his purchase, much less of what the amount of that loss was, and therefore there was nothing to base the finding of either Rs. 13 or 30 upon. As to the other item the plaint merely alleges that appellant's breach of her promise has caused great pain of mind and unhappiness to respondent, his parents and relations. In this suit obviously the effect upon respondent himself can alone be considered. In his evidence he merely says that his friends and associates jeered at him and he felt much shame on account of the matter. His witnesses do not speak to any other consequences of the breach than a feeling of shame on the part of respondent. I find nothing on the record to indicate that he has suffered injury either to his social standing or to his reputation, much less any evidence indicating any measure of damages for such injury. In my opinion that a man has merely become the butt of his acquaintances' jests, or has experienced a feeling of shame, does not constitute an injury for which damages can be awarded in a suit of this nature. I therefore reverse the decree of the District Court and dismiss the suit with costs in all Courts, advocates fee in this appeal two gold mohurs.

K.N./R.K. *Appeal accepted.*

A. I. R. 1914 Lower Burma 205

FOX, C. J. AND HARTNOLL, J.

Twinzas Oil Company, Ltd.—Respondents—Appellants.

v.

Mower & Co. Ltd.—Plaintiffs—Respondents.

First Appeal No. 134 of 1912, Decided on 7th December 1914.

Contract Act (9 of 1872), S. 216—Managing agents held not entitled to make profits out of goods supplied.

The plaintiff company were managing agents of the defendant company and supplied to the latter, at reasonable retail prices, goods which they themselves had bought wholesale at lower prices:

Held: that the plaintiff company were not entitled to make any profit on the goods supplied to their principal, the defendant company:

Bently v. *Craven*, (1853) 52 *E. R.* 29, *Ref.* and *Foll.* [P 206 C 2]

J. R. Das—for Appellants.

Eggar—for Respondents.

FOX, C. J.—The plaintiff company, Mower and Company, Limited. were managing agents of the defendant Company, the Twinzas Oil Company, Limited, Mower and Company, Limited, carried on a general merchants' business and dealt amongst other things in what are called engineering stores. The Twinzas Oil Company's field manager, when he required such stores, would write to Mower and Company, Limited, to supply them. Sometimes the latter would obtain them from other firms and sometimes they would supply them from their own stores. Their suit was to recover what they charged for certain stores which they had supplied from their own stock. So far as the evidence goes, the charges they made for goods supplied to the defendant company were what they would have made to any of their customers, and were reasonable retail prices. They themselves had bought the goods wholesale at lower prices.

On behalf of the defendant company it was contended that the plaintiff company having been its managing agent at the time the goods were supplied it could not make any profit on goods supplied to it, and consequently no more than the actual cost price would be charged against them.

On the one hand, vigorous expressions of the rule that no agent in the course of his agency can be allowed to make any profit out of a transaction on behalf of his principal without the knowledge and consent of the principal, have been relied on. On the other side, some more recent decisions, the result of which is that a Court should not interfere where the contract has not been rescinded by the principal and where the thing bought and sold cannot be restored, have been quoted as affording a rule which debars the defendant's contention. The learned Judge held that as the defendant company had accepted the contracts, had not rescinded them and could not restore the goods, it was bound to pay the prices charged. He was influenced in this decision by a consideration chiefly of the reports of the first and second stages of the limitation between a contributory and a former direction during the wind-

ing up of the Cape Breton company: *In re Cape Breton Co.* (1). The report of the last stage of this litigation was not brought to the learned Judge's notice: it is to be found in *Cavendish Bentinck* v. *Fenn* (2) before the House of Lords. The facts in that case were that Fenn, the director, had been a party to a purchase of some property by the company for £42,000, which he and others had purchased two years previously for £5,500 at a time when he was not a director of the company. The contributory sought to make Fenn liable for misfeasance or breach of trust on the ground that the director had allowed the company to make the purchase withoutd isclosing his own interest, and at a price far exceeding the value. The contributory's claim was dismissed by all the Courts, but the case is remarkable for the variety and divergence of the grounds on which the learned Judges dealing with the case based their decisions.

In the House of Lords the case was decided on grounds which had not been dealt with by either of the lower Courts. One noble Lord expressly stated that he did not desire to rest his judgment on the reasons which were assigned for the decision of the learned Judges in the Court of appeal, without questioning in any way the decisions of Pearson, J., and the majority of the Court of appeal in that case. It does not appear to me that the judgments apply to the case we have to deal with. In that case Fenn, the director had acquired an interest in the properties long before their purchase by the company and his becoming a director of it. He alone did not buy the properties for the company: the purchase was made by the Board of Directors. Some years afterwards during the course of the winding-up, two proposals were put before the company: one that the purchase should be repudiated, and the other that it should be adopted and that the properties should be sold to the best advantage. The latter was adopted by the company in meeting, and the properties were subsequently sold by the liquidator. It would have been strange if under such circumstances a shareholder or contributory of the company could have been entitled to make Fenn account even if he had not disclosed his interest in the properties to his fellow-directors. In the present case we have not to deal with agents for the purchase of specific properties. The supply of the goods, their sale and purchase were entirely in the hands of the plaintiff company and were carried by them alone. There is nothing to show that the directors of the defendant company were supplying it with goods on the terms on which it was doing so. It appears to me that in such a case the rule stated in *Bentley* v. *Craven* (3) is applicable and the plaintiff company was not entitled to make any profit on the gonds supplied to its principal, the defendant company.

It may be noted that Cotton, L. J., referred to *Bentley* v. *Craven* (3) in his judgment in the Court of Appeal in the *Cape Breton* case: *In re Cape Breton* (1). He did not disagree with the decision; on the contrary his remarks imply that it was undoubtedly right, but he distinguished the case from the one they were dealing with.

In the House of Lords, Lord Herschell in some passages of his judgment refers to a description of agency such as we have to deal with in the present case, as not being parallel with the case they had to deal with. No doubt his remarks contemplate that a company's agent employed to make purchases of goods for the company at market rates, who supplies his own goods at his own prices, could only be made to repay to the company and excess over market prices, but he was not deciding this question, and what he said cannot be taken as overruling the long-standing rule referred to in *Bentley* v. *Craven* (2).

For these reasons, I hold that for their own goods which they supplied to the defendant company the plaintiff company is not entitled to recover more than the cost price of the goods to themselves.

I would consequently set aside the decree of the original Court and remand the case to it for an inquiry as to the cost of the goods supplied and for a decree for the amount of the price of the goods at cost rates.

(1) [1885] 29 Ch. D. 795=54 L. J. Ch. 822=53 L. T. 181.
(2) [1887] 12 A. C. 652=57 L. J. Ch. 552=57 L. T. 773=36 W. R. 641.
(3) [1853]52 E. R. 29=18 Beav. 75=104 R. R. 373.

S. N. DAR, B.
Vakil High Court
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The plaintiff company should pay the defendant company costs of this appeal.

Hartnoll, J.—I concur.

K.N./R.K. *Decree set aside; Case remanded.*

A. I. R. 1914 Lower Burma 207 (1)

ORMOND AND PARLETT, JJ.

Ko Kyo and *another* — Defendants—Appellants.

v.

A. K. Curpen Chetty and *another*—Plaintiffs—Respondents.

First Appeal No. 161 of 1911, Decided on 23rd February 1914, from judgment and decree of Dist. Judge, Thaton, D./ 20th July 1911.

Transfer of Property Act (4 of 1882), S. 2, (e)—Valid equitable mortgage made before Act was applied could be assigned.

Under S. 2, Cl. (e), T. P. Act, an equitable mortgage made prior to 1st January 1905 can be assigned where the mortgage is originally valid and the parties are entitled to make the mortgage into one bearing compound interest by an oral agreement subsequent to 1st January 1905. [P 207 C 2]

Palit—for Appellants.

Giles—for Respondents.

Ormond, J.—This is an appeal by defendants 2 and 3 only, against whom a mortgage decree has been given in favour of the plaintiff in the lower Court. Defendants 2 and 3 deposited certain title-deeds with defendant 1's a Chetty firm, as security for a loan and gave him pro-notes as collateral security. At the end of January 1905, the accounts were made up between defendants.1, 2 and 3 and defendants 2 and 3 gave defendant 1 as renewal of the pronotes then outstanding, two pro-notes and a mortgage bond for Rs. 95. The title-deeds were left in deposit with defendant 1. These documents were left as security with defendant 1 for moneys due from defendants 2 and 3 to defendant 1 before January 1905. Defendant 1 subsequently assigned this security and title-deeds to the plaintiffs. It is contended for the appellants that inasmuch as new documents were given as collateral security after 1st January 1905 when the Transfer of Property Act came into force the deposit of title-deeds and the transactions having taken place at one Zathalin, there was no valid mortgage —and alternatively, that if the old mortgage continued, it would not cover the whole debt inasmuch as it would not cover the compound interest, the amount of the debt having been calculated and interest added to the principal. The case of *Aw Nin* v. *Rama Chetty* (1) is an authority to show that under S. 2 (e), T. P. Act, the equitable mortgage made prior to 1st January 1905 could be assigned in the districts by deposit after that date. It is also authority to show that the equitable mortgage having been valid originally, the parties would be entitled by oral agreement to make the mortgage into one bearing compound interest by an oral agreement subsequent to 1st January 1905. This appeal therefore in my opinion, should be dismissed with costs.

It must however be pointed out that as the bond for Rs. 95 executed on 30th January 1905 by the appellants in favour of the defendant Chetty firm purported to be a simple mortgage only, it required registration and being unregistered it is inoperative to create any mortgage. Para. 1 of the decree of the District Court should accordingly be amended so as to make it clear that the house and site referred to in that bond are not liable to be sold under the mortgage decree passed against the defendant Chetty firm.

Parlett, J.—I agree.

K.N./R.K *Appeal dismissed.*

(1) [1909] 5 L. B. R. 93=4 I. C. 288.

A. I. R. 1914 Lower Burma 207 (2)

TWOMEY, J.

V. V. M. Chetty Firm—Applicants.

v.

R. M. A. R. Arunachallum Chetty — Respondent.

Civil Revn. Petn. No. 17 of 1914, Decided on 3rd July 1914.

Civil P. C. (5 of 1908), S. 115 — Interlocutory orders — No interference unless substantial injury is caused — Order refusing to frame issue not interfered with.

Even if the High Court can deal in revision with an interlocutory order in a suit, the exercise of the power is in the discretion of the Court and the power should not be exercised unless it appears that substantial injury may be caused to the applicant if he is let to wait for the ultimate remedy in appeal from the decree.

There is no precedent for interference in revision with an order declining to frame an additional issue in a suit. [P 208 C 1]

B. P. Lentaigne—for Applicants.

J. R. Das—for Respondent.

Judgment.—There is the authority of the Calcutta High Court in support of the view that the High Court can deal in revision with an interlocutory order

in a suit *Dhapi* v. *Ram Pershad* (1), but I note that several other High Courts are opposed to this view. At any rate the exercise of this power is in the discretion of the Court and I think it is obvious that the power should not be exercised, unless it appears that substantial injury may be caused to the applicant if he is left to wait for his ultimate remedy in appeal from the decree. There is no precedent, so far as I am aware, for interference in revision with such an order as that now under consideration, viz. an order declining to frame an additional issue in a suit. It is manifestly inexpedient that the progress of a suit should be liable to interruption on snch a ground as this, and the most cogent reasons would be necessary to justify it.

The applicants are some of the defendants in a suit brought by the respondent as plaintiff, and the additional issue which they wanted the Court to frame was an issue as to whether certain other persons should not be joined as parties to the suit. Apparently this would depend on whether the plaintiff-respondent sued in his individual capacity or as representing his firm, the other persons referred to being, as it is alleged, co-partners therein. The heading of the plaint is of an ambiguous character and it certainly reads at first sight as if the plaintiff was suing as an individual. But the lower Court has treated the suit as a suit by the plaintiff's firm, and in an order dated after the present application was filed the learned Judge has decided that it is unnecessary to join the persons referred to. The reason given is that they are merely the legal representatives of deceased partners and are therefore not necessary parties under O. 34, R. 4. It further appears from the record that when issues were framed the applicant's counsel was present and made no application then for an additional issue as to these persons being necessary parties. It cannot be said that they did not then know that Ramaswami was a partner, for this fact was disclosed in the examination for the plaintiff's agent two days earlier (the applicant's advocate being present).

On the question whether the suit has been rightly treated as a suit under O. 30, I can express no opinion at this stage. But in the circumstances mentioned above I am of opinion that no sufficient ground has been made out for interference in revision with the District Judge's order of 15th December 1913.

The application is dismissed with costs; advocate's fee three gold mohurs.

K.N./R.K. *Application dismissed.*

(1) [1887] 14 Cal. 768.

A. I. R. 1914 Lower Burma 208

ORMOND AND PARLETT, JJ.

Ahmed Gulam Mahomed Sadiq—Appellant.

v.

Md. Cassim Makda and *others*— Respondents.

First Appeal No. 72 of 1912, Decided on 26th February 1914.

Mahomedan Law — Gift — Divesting of ownership and possession is necessary—Gift in future is void — Registration cannot effect validity—Invalid gift is revocable.

For a gift to be valid, the donor must do everything to put the donee into possession and to divest himself of his rights of ownersnip. If the property is in the hands of a third person the donor must give notice to that person to hand over the property to the donee. If a gift is not intended to take effect in presenti, it would be void. Registration cannot make an invalid gift valid. An invalid gift is revocable. [P 209 C 1]

J. R. Das—for Appellant.

Rutledge and *Doctor*—for Respondents.

Judgment.—The parties in this case are Mahomedans. One Rasool Bi executed a deed of gift on 15th October 1904 and registered it on the 19th October in favour of 20 of her great-grandchildren. Of the 20 great-grandchildren at the time of the gift, Mahomed and Ibrahim were two sons of Cassim Moosaji, grandson of Rasool Bi. She executed a deed of cancellation on the 10th November 1904. On the 11th November 1904 she executed a fresh gift to her heirs, that is to say, to the children cf her son, Ismail who alone were her heirs, i. e., excluding the other 16 descendants who were donees under the first deed of gift. Rasool Bi died in January 1905. The plaintiff is one of these 16 descendants who sues for administration of Rasool Bi's estate and for a declaration that he is entitled to 1/20th share in that estate under the deed of gift of 15th October 1904. The learned Judge on the original side dismissed the suit on the ground that possession had not been given under that deed of gift. We have been referred to the case of *Kalidas Mullick* v. *Kanhaya*

Lal Pundit (1), also to the case of *Mohomed Buksh Khan* v. *Hosseini Bibi* (2). Both these are Privy Council cases. The first one deals with a gift under Hindu law and is quoted with approval in the subsequent case. In the first case the donor supported the gift. The property was in the possession of a third party who claimed it as his own. Possession therefore was not given and it was held that if a donor does all that he can to put the donee into possession that gives the donee the right to possession. In the second case the donor sued to set aside the gift, but she had herself put the donees into possession and the gift was held good. In the present case the subject of the gift was a 1/6th share in the estate of Rasool Bi's grandson Cassim, who predeceased Rasool Bi and which share Rasool Bi inherited as his heir. Cassim's estate was in the possession of his brother Ahmed who was also the guardian of Cassim's minor children, defendants 3 to 8.

Ahmed, the son of Fatima and Ahmed and Ibrahim, sons of Ismail, were the only adults among the 20 great-grandchildren. Of those adults Ahmed, the plaintiff, Mahomed and Ibrahim alone had notice of the gift, though the father of Fatima's children Gulam Mahomed, who may be taken to be the guardian of his other children who were minors, had also notice; but no notice was given to the man in possession, viz, Ahmed. It is not suggested that Ahmed was in possession of the property otherwise than on behalf of those rightfully entitled to it. And if possession was intended to be given to the donees at the time of the gift, notice should have been given to Ahmed. It cannot be said that in the absence of such notice everything was done by the donor to put the donee into possession and to divest herself of her rights of ownership. If the gift was not intended to take effect in praesenti the gift would be void. If the gift is invalid under Mahomedan law registration could not make it valid. A gift under Mahomedan law can be orally made, and if *A* makes a gift of property to *B* orally, and it is in the possession of a trustee *X*, it might equally be contended in that case that the gift was complete at the time of the oral transaction without any notice being given to *X*. Inasmuch as the donor has not done everything in her power to put the donees into possession by giving notice to Ahmed, and inasmuch as the donees have not taken possession before the gift was revoked, we think the gift is invalid under Mahomedan law. It is not necessary to go into the question whether the deed was obtained by undue influence, or not.

I would dismiss this appeal with costs.

K.N./R.K. *Appeal dismissed.*

(1) [1885] 11 Cal. 121=11 I. A. 218 (P. C).
(2) [1888] 15 Cal. 684=15 I. A. 81 (P. C).

A. I. R. 1914 Lower Burma 209

FOX, C. J. AND HARTNOLL, J.

E. E. Dover—Plaintiff—Appellant.

v.

E. S. Dover and *others*—Defendants—Respondents.

First Appeal No. 127 of 1914, Decided on 15th September 1914, from judgment and decree of Robinson, J., D/- 9th July 1914, in Civil Regular No. 151 of 1914.

Civil P. C. (5 of 1908), O. 40, R. 1—Partnership—Receiver is usually appointed and the goodwill and stock in trade sold.

The usual way of guarding the divergent interests of the partners when they fall out is by appointing a receiver and ordering the goodwill of the business and stock in-trade to be sold, the partners being at liberty to bid at the sale.

[P 210 C 2]

Campagnac—for Appellant.

Lambert (*Sr.*)—for Respondents.

Order.—This is an application for the appointment of an ad interim receiver of partnership property pending the disposal of an appeal from a preliminary decree directing accounts of the partnership to be taken. The judgment on which the preliminary decree is based was adverse to the appellant.

Complications have arisen in connexion with the estate of the late E. T. Dover owing to his widow and administratrix not having dealt with the estate in the way in which the law directs an estate should be dealt with. The consequence is that the parties have created a nondescript relationship between themselves in connexion with the business of the deceased, which vested in the administration as part of his estate. In the course of the case however the advocates for all parties agreed that this relationship should be regarded as one of partnership and on the 18th June a petition by the appellant consented to by the advocate of the defendants was filed, praying that Tuesday, the 23rd June, might be fixed for

passing a preliminary decree for dissolution of the partnership and for taking of partnership accounts, etc. The day mentioned was fixed for the purpose, but no preliminary decree was then made. Issues were fixed upon the points in dispute, evidence was taken and a decision was come to on all the issues except one, and a preliminary decree was drawn up. This omits a good deal of what is included in Form 21, Appendix D, Sch. 1, Civil P. C. The record affords no explanation of why the judgment did not direct a decree in the ordinary form, nor does the judgment explain why accounts were to be taken to the 31st March of this year only.

The decree should in ordinary course have declared that the partnership should stand dissolved as from the day on which the judgment was pronounced, and should have appointed a receiver of the partnership estate and effects to get in the debts due to it and should have ordered the goodwill of the business and stock-in-trade to be sold on the application of the parties, leaving it to an officer of the Court to fix a reserved bidding, and should further have ordered that any of the parties should be at liberty to bid at the sale.

The form in the Schedule to the Civil Procedure Code is based on the ordinary practice of the English Courts: see Lindley on Partnership (8th Edn). p. 614.

The application for a receiver is opposed by the defendants on the ground that it will cause some of them great inconvenience and expense, and incidentally that those living in the house where the business is carried on and those engaged in carrying on the business at the present time should be allowed to do so. This assumes that the goodwill should be allotted to them, and that the Court should tell the plaintiff that he must be content with what the Court may, by some unexplained method of valuation, hold to be the value of the goodwill and assets of the business.

Inconvenience to the parties is an inevitable incident when partners fall out and is a disadvantage of carrying on business in partnership. The rules as to goodwill are thus stated in Lindley on Partnership, page 511:

1. That if a firm is dissolved and there is no agreement to the contrary, the goodwill must be sold for the benefit of all the partners if any of them insists on such sale.

2. That so far as is possible, having regard to the right of every partner to carry on business himself, the Court will, on the dissolution, interfere to protect and preserve the goodwill until it can be sold.

The way in which it does interfere is to appoint a receiver of the partnership assets. A dissolution is inevitable in the present case, and we may regard as done what should have been done by the preliminary decree. It does not appear to us that in the present state of feeling between the plaintiff and the defendants there is any ground for hope that the parties will come to an arrangement about taking over the business. We therefore think that the ordinary course should be followed in the suit.

Mr. A. Agabeg having already been appointed commissioner to take the accounts we appoint him receiver of the partnership estate and effects to get in its outstanding book-debts and claims, to manage the business until it can be sold and to sell the stock-in-trade and goodwill of the business as a going concern at such reserve as he may think fit to fix, the parties being at liberty to bid at the sale. It being evident that the lease of the premises in which the business is carried on was taken for the purposes of the business, the remainder of the term of the lease must be included in the sale. If however the parties all agree to some other arrangement within a month from this date, the sale need not be carried out. The defendants must pay the plaintiff's costs of this application, three gold mohurs being allowed as advocate's fees.

K.N./R.K. *Appeal allowed.*

A. I. R. 1914 Lower Burma 210

HARTNOLL, OFFG. C. J. AND TWOMEY, J.

Tuvuriammal— Appellant.

v.

Santiago—Respondent.

First Appeal No. 29 of 1913, Decided on 12th March 1914.

Divorce Act (4 of 1869), Ss. 7 and 45 — "Principles and Rules," meaning explained— Restitution of conjugal rights—Suit for— Marriage ceremony admitted—Coercion and nonconsent pleaded— Defendant has to begin—Civil P. C. (1908), O. 18, R. 1.

The words "principles and rules" used in S. 7, Divorce Act, refer to rules of quasi substantive

rather than of mere adjective law: 22 *Bom.* 612, *Foll.* [P 211 C 2]

Where in a suit for the restitution of conjugal rights by a husband the wife admitted the marriage ceremony but pleaded coercion and nonconsent.

Held: that having regard to the words "principles and rules" in S. 7, Divorce Act, and to S. 45 of the same Act, and O. 18, R.1, Civil P. C., the right party to begin the case was the defendant: *Burroughs* v. *Burroughs*, 2 *S. W. & Tr.* 544, *Foll.* [P 212 C 1]

Robertson—for Appellant.

S. N. Sen—for Respondent.

Hartnoll, Offg. C. J.— The respondent sued appellant for a decree for restitution of conjugal rights and has obtained a decree for the relief asked for. Respondent's case is that he and the appellant were married according to Christian rites on 28th July 1902 and since then cohabited together, but that since the month of July 1910 appellant, without any lawful cause, has withdrawn herself and still does withdraw herself from bed, board and mutual cohabitation with him and has refused and still does refuse to render to him conjual rights although requested by him to do so. Appellant's defence is that at no time was there celebrated a valid or legal marriage between her and the respondent, that the marriage alleged by the respondent was brought about by force and intimidation. She at the same time does not deny that a marriage ceremony took place between them at a Roman Catholic Church. She alleges that after the said marriage respondent forcibly took her away to Dahidaw and kept her in a house under confinement for a fortnight and that in or about the month of August 1902, as he found that she was unwilling to cohabit with him, he allowed her to go to her mother's residence at Pazandaung, at which place she resided till the suit was brought. She submits that she was never legally married to respondent and that such marriage was null and void and of no effect. She also says that since August 1902 till the institution of the suit respondent has never called on her to return to him and render him marital duties.

The first ground of appeal is that the learned Judge on the original side erred in ruling that the appellant had to begin the case as such ruling prejudiced her in substantiating her defence. The learned Judge seems to have called on appellant to begin and at the hearing of this appeal her learned counsel allowed that he never objected to her beginning. So the learned Judge does not seem to have been asked to rule on who should begin. S. 99, Civil P. C., lays down that no decree is to be reversed or substantially varied nor shall any case be remanded in appeal on account of any error or irregularity in any proceedings in the suit not affecting the merits of the case an S. 45, Divorce Act enacts: "Subject to the provisions herein contained, all proceedings under this Act between party and party shall be regulated by the Code of Civil Procedure." S. 7 of the same Act enacts: "Subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which in the opinion of the said Courts are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief."

Reliance is placed on the case of *Burroughs* v. *Burroughs* (1), where in a case of the present nature the Judge ordinarily ruled that the petitioner had the right to begin though the substantive issue may be raised on the husband's (in the case respondent's) answer. The first ground of appeal is based on a point which is purely one of procedure and in my opinion the words "principles and rules" used in S. 7, Divorce Act should not be held to include such a point of procedure. The meaning to be attached to such words was considered in the case of *A.* v. *B.* (2), when Farran, C. J., said: "The principles and rules here referred to (i. e. in S. 7, Divorce Act), are not, we think, mere rules of procedure including rules which regulate appeals which are laid down in the subsequent Ss. 45 and 55 of the Act, but are the rules and principles which determine the cases in which the Court will grant relief to the petitioner appearing before it or refuse that relief —rules of quasi substantive rather than mere adjective law. 'I think that view is right. Even therefore, if it was for the respondent to have begun, I think

(1) [1862] 2 S. W. & T. 544=5 L. T. 771=31 L. J. Mat. 56.

(2) [1898] 22 Bom. 612.

that S. 99, Civil P. C. must be considered in determining whether the decree of the learned Judge on the original side should be interfered with, and taking that section into consideration, I am of opinion that even if it was for the respondent to have begun the appellant has not been prejudiced thereby. She admits that the marriage ceremony took place and that she signed the register : but she pleads that she was forced and coerced into a marriage against her will. It was for her to prove this affirmatively, and it seems to me that, this being the case, it was immaterial to her who began. But I consider that she was the right party to begin. Holding as I do that the words "principles and rules" in S. 7, Divorce Act, do not include mere rules of procedure and having regard to S. 45 of the same Act and O. 18, R. 1, Civil P. C., I think that it was for appellant to begin. She admits the ceremony but pleads coercion and non consent. Unless she can prove such, the marriage was valid and binding on her.

The next ground of appeal is that appellant did not consent to the marriage with the respondent and that there was no marriage between them legally enforceable. She has most certainly not proved her allegations. Three children have been born to her, one before the marriage and two after it, one in 1903 and the other in 1906. The father of each of them was registered as Santiago Servai. The child born in 1906 was born some four years after the marriage. She endeavours to make out that another Santiago Servai, which is respondent's name is the father ; but there is no evidence of any worth that such is the case. If she was forced and coerced as she says, surely she would have taken proceedings at the time. There is no good evidence to show that she was forced and coerced. The ground must in my opinion fail.

The next ground is that respondent has failed to prove his case. Appellant having admitted the marriage ceremony and having failed to prove her case this ground has no substance in it. The fourth ground I have already dealt with. I have no doubt that respondent was the father of her children.

The fifth ground is that the suit should have been dismissed as there was no demand as required by law before the institution of the suit. This ground refers to an English rule of procedure which is dealt with in the case of *Field* v. *Field* (3). Being a mere rule of procedure I do not think that it is included in the words "principles and rules" as used in S. 7, Divorce Act. Moreover, having regard to the words of S. 33, Divorce Act and the beginning words of S. 7, absence of notice cannot be pleaded as a defence to an action of this nature. Appellant does not wish to return to her husband and ask that his suit be dismissed. She in her evidence says that her father asked her return to respondent and she refused.

The sixth ground was not argued. As regards the seventh ground it would appear that the parties have been separated for some years. During the three years the respondent has taken no action. He says that he does so now as his wife is intimate with another man. It does not appear that she is possessed of any means. I think the ground should be allowed.

In the result I would confirm the decree of the learned Judge on the original side except that I would order that each party do pay their own costs.

Twomey, J.—I agree.

K.N./R.K. *Decree confirmed*

(3) [1889] 14 P. D. 26=37 W. R. 134=59 L. T. 880.

A. I. R. 1914 Lower Burma 212

TWOMEY, J.

Emperor

v.

Po Ba—Accused.

Criminal Revn. No. 106-B of 1914, Decided on 25th May 1914, from order of Sub-Divl. Judge.

Whipping Act (6 of 1864), S. 5—Magistrate's finding as to age is final—Sentence of whipping carried out—No other sentence can be inflicted.

The finding of a Magistrate as to the age of the accused is final under S. 5, Explanation, of the Whipping Act.

Where the sentence of whipping has been carried out, no other punishment can be awarded, even if the sentence was inadequate. [P 213 C 1]

Order.—I agree with the learned Sub-Divisional Judge in thinking that the sentence of 15 stripes passed on Nga Po Ba for the offence of rape is very inadequate. I also agree that the Magistrate's finding as to the age of the accused is not justified by the evidence

But that finding is final and conclusive under S. 5, Whipping Act: see the Explanation to the section. The sentence of whipping has been carried out.

A whipping under S. 5, Whipping Act, is in "lieu of any other punishment;" and it would not be lawful to add any other punishment to the punishment which has already been inflicted in this case.

The records be returned.

K.N./R.K. *Records returned.*

A. I. R. 1914 Lower Burma 213

PARLETT, J.

Rahima Bi—Defendant—Appellant.

v.

Mahomed Saleh — Plaintiff — Respondent.

Special Second Appeal No. 227 of 1913, Decided on 8th May 1914.

Mahomedan Law—Marriage — Consent — Shafi girl married to Hanafi against father's disapproval and misrepresenting her to be converted—Marriage held invalid—Who is "siyeeba" explained.

Where the marriage ceremony between a Hanafi and a Shafi girl was hurriedly and clandestinely gone through with the knowledge that the girl's father did not and would not consent to it, and to satisfy the Mullah, should that be necessary, the story of her conversion to the Hanafi sect was invented:

Held: that the circumstances under which and the manner in which the so-called marriage was performed were such that the usual presumption in favour of its validity could not be made; that it was invalid for want of consent of the girl's father; that under Shafi law a woman who under any circumstances had connexion with a man became siyeeba. [P 215 C 1]

Israil Khan—for Appellant.

J. R. Das—for Respondent.

Judgment.—Plaintiff in this case sued for restitution of conjugal rights. The parties are Mahomedans, plaintiff belonging to the Hanafi sect, defendant to the Shafi. His case is that they eloped together from her aunt's house in Sitkegon, and went to a Burman, Maung Ba Tun's house in Daingwunkwin, where they were married according to Mahomedan custom on 21st July 1911. They then lived together for three weeks in plaintiff's father's house in Moulmein, and thereafter for one and a half months in her aunt's house. Then under her father's and aunt's influence she refused him access and he has not seen her since. Defendant denies that the marriage was valid, as her father was neither present at it nor consented to it. She admits cohabiting with plaintiff for a short time at his parent's house, and says she left him on account of his wife being there and returned to her aunt's and father's houses; she denies that he visited her there. The District Court held that there was nothing to show that defendant was not a virgin at the time the marriage ceremony wae gone through, and consequently by the Shafi law there could be no valid marriage without the consent of her guardian, in this instance her father, and that admittedly was not obtained. The suit was therefore dismissed. On appeal the Divisional Court held that she had lost her virginity by cohabiting with plaintiff for some eight days before the ceremony of marriage, and had thereby become a siyeeba and that therefore her father's consent was unnecessary to the marriage, which in other respects was regular. Plaintiff was therefore granted a decree. Defendant now appeals on two grounds, first, that intercourse, after elopement with the man with whom the marriage ceremony was subsequently gone through, did not render her a siyeeba within the meaning of the Mahomedan law and secondly, that even if it did, her marriage without her father's consent would still be invalid under the Shafi law.

The facts are that at the time of suit the girl was 19 or 20 years of age; her mother had long been dead, and she had been living with her aunt, Ma Aung. Her father had married again and had a wife and second family at Kyauktalon: when in Moulmein however he lived in the same house as Ma Aung and defendant. He had rejected a proposal from plaintiff for his daughter's hand. He says he objects to the match, as plaintiff already had a wife and gave himself out to defendant as a bachelor. The young couple then eloped and went and lived in one Ba Tun's house at Daingwunkwin. Some four days later plaintiff, his father, a maistry of theirs, named Abdulla, and a pleader named Abdul Rahim, a brother-in-law of plaintiff and a tenant of his father, went and called the Mullah from a mosque on admittedly false pretences and took him off in a gharry to Ba Tun's house. On the way Abdul Rahim and Abdulla told him he was wanted to perform a marriage ceremony. At the house he did not see the bride, but was told that plaintiff's father was her vakil, and that she was a Shafi but had been converted to the Hanafi, the bride-

groom's sect. He performed the ceremony at ten o'clock at night with Abdul Rahim and Abdulla as witnesses, plaintiff, his father, acting as the girl's vakil, and a Burman being the only others present. Not having brought his register he wrote the marriage certificate on a loose sheet of paper which the bride is said to have signed: Ex. A.

The Mullah puts the date a day later than plaintiff, 22nd July 1911. It is admitted that the girl was hidden from her father and aunt and that the marriage was performed without their knowledge, as it was known that the father would not consent and it was feared he would take her away. About four days later the couple moved to plaintiff's father's house and lived there about three weeks. Then the young couple visited her father's and aunt's house. According to the plaint she remained there and plaintiff visited her regularly; defendant in her written statement denied that he so visited her there. In his evidence plaintiff tried to make out that the two of them lived together in her father's and aunt's house: his own witness, Ma Thein, who lives close to Ma Aung, did not however bear this out, and there is no doubt it is untrue. The point is unimportant except as showing how unscrupulous plaintiff and his father are. It is clear therefore that the marriage ceremony was hurriedly and clandestinely gone through with the knowledge that the girl's father did not and would not consent to it. It is clear too that plaintiff's father, at any rate, had suspicions that a Shafi girl could only marry with her father's consent, and therefore he invented the lie that she was converted to the Hanafi sect to satisfy the Mullah, should that be necessary.

It was not denied in this Court that intercourse between the parties took place after the elopement and before the marriage ceremony. No authority was cited for the proposition that such intercourse would not constitute her a siyeeba in the eyes of Mahomedan law. On the other hand I gather from a passage at p. 35 of Hamilton's Hedaya that under Shafi law a woman who has under any circumstances had connexion with a man becomes a siyeeba. On this point I think the Divisional Court was right.

Very little light has been thrown by the arguments of counsel upon the question whether though defendant was a siyeeba, her father's consent was still indispensable to her valid marriage. No evidence was given as to the source or authority of the various texts quoted in the lower Court on plaintiff's behalf, nor do they all by any means bear out the legal proposition on which he relies. Among them Ex. B lays down that no guardian has power to compel a siyeeba woman of the Shafi sect to a marriage against her will; but it goes on to say that if she consents to anyone else performing her marriage, he can do so as her agent. Ex. C is against him as it says no Shafi marriage is valid which is contracted without the consent of the guardian and the presence of two upright witnesses. In the present case even the witnesses cannot be called independent. Ex. E says that the guardian's authority ceases when a Shafi siyeeba woman attains her majority. Though however he may be unable any longer to compel her to a marriage, it does not necessarily follow that she can contract one without his consent. Ex. G points out that a siyeeba being under no one's guardianship is incapable of pronouncing the proposal or acceptance required in a marriage ceremony; she must therefore give permission to some man to make the declaration on her behalf. Ex. H also says that a Shafi siyeeba who has attained her majority can give assent to some one to effect her marriage.

As the former text expressly notes that the Hanafi law does no trequire her to authorize anyone, it may be that these passages, if authoritative, merely emphasize the difference between the Shafi and Hanafi Schools as regards the necessity for the guardian's consent and refer to the case where the woman's natural guardian, i. e., her father, is no longer alive, which would frequently happen when the siyeeba had been previously married. Ex. F alone states that "a virgin girl of the Shafi sect who has attained maturity marries a man of the Hanafi sect or of the Shafi sect and if her father is not willing, even if he desires to nullify the marriage, it will be valid notwithstanding;" and this text so exactly fits the present plaintiff's case as to suggest the possibility that it may have been made to do so. Certainly its authority is not shown. On the

other hand Sir Roland Wilson, a recognized authority on Mahomedan law, writes that according to the Shafi doctrines :"No woman, whether a virgin or not, can give herself in marriage without the intervention of a guardian" (Anglo-Mahomedan Law, 4th Edn. Art. 392) and again: "If a person has been contracted in marriage by an unauthorized agent, the transaction cannot be rendered valid through the principal's ratification:" Anglo-Mahomedan Law, 4th Edn., Art. 394. The circumstances under which and the manner in which the so-called marriage in this case was performed are such that the usual presumption in favour of its validity cannot be made. Authority has not been shown for holding that it was valid notwithstanding the want of defendant's father's consent, whereas there is good authority to show that it was not valid. I therefore hold that the validity of the marriage is not made out, and reverse the decree of the Divisional Court and restore that of the District Court with costs throughout, Advocate's fees in this Court two gold mohurs.

K.N./R.K. *Decree reversed.*

A. I. R. 1914 Lower Burma 215

PARLETT, J.

Burma Railway Company Ltd.—Appellants.

v.

Hiralal—Respondent.

Civil Revn. No. 79 of 1913, Decided on 4th June 1914.

Civil P.C. (5 of 1908), O. 21, Rr. 48 and 52—Prohibitory order on auditor not complied on ground that amount was not at his disposal but of Agent of Railway Company—Amount could be attached subject to Railway Company's lien and disregard of order held improper—Railway Company held liable for its officer's default—Tort, vicarious liability.

The auditor of a Railway Company was the only disbursing officer of the company and was notified under O. 21, R. 48, Civil P. C., as the officer to whom notice should be sent of orders attaching salary or allowances of railway employees. He was prohibited by the order of a Court from paying to a railway employee the amount of a security deposit. At the time of the order the moneys were under the control of the Agent of the Railway Company and could not be paid to the depositor employee without the sanction of the Agent. The auditor ignored the Court's prohibitory order on the plea that the amount of the security deposit was not at the disposal of the employee and, therefore was not liable to attachment :

Held: (1) that the deposit could be attached subject to the Railway Company's lien, though it could not be realized until freed from that lien; (2) that the prohibitory order of the Court ought not to have been disregarded by the auditor ; and (3) that the Railway Company was liable for his default. [P 215 C 2 ; P 216 C 1]

Ormiston—for Appellants.

Gregory—for Respondent.

Judgment.—On 25th July 1912, respondent brought a suit against three persons, one of whom was a servant of the Burma Ry. Co., and at the same time filed an application supported by affidavit to the effect that this defendant had resigned his appointment and would be paid up on 11th August, and asking for prohibitory order to issue to the auditor of the Burma Railways prohibiting him from paying to the defendant Rs. 140, being the amount of a security deposit made by him, and also a moiety of the defendant's salary for July 1912, and to the defendant prohibiting him from drawing the amounts prohibited. Orders were issued accordingly. That issued to the auditor was returned was endorsed as not accepted on account of insufficient particulars as to the identity of the employee and with a note that "security deposit cannot be attached if the judgment-debtor is still in employment." Eventually, on 2nd August, it was endorsed by the auditor as "accepted as regards salary only." On 5th August the suit was decreed and on 7th August the plaintiff obtained another prohibitory order to the auditor to withhold payment of the Rs. 140. This he endorsed on 12th August as "Not accepted. The security deposit is not at the disposal of the judgment-debtor." This opinion of his was wrong.

The deposit could be attached, subject to the Railway Company's lien, though it could not be realized until freed from that lien. In the present case the Railway Company claimed no lien on any part of the deposit and though they advanced the defence that the money was not liable to attachment at all they have now abandoned it. In this suit the plaintiff obtained a decree against the Railway Company for the Rs. 140, disbursed by their auditor after receipt of the prohibitory orders referred to above. The Railway Company contends that they were not bound by the orders served on their auditor who was not the proper officer to be served with such

orders. It will be noted that the auditor never suggested that he was not in a position to comply with the prohibitory orders, but merely disregarded them on the strength of his opinion that the money in question was not liable to attachment ; that opinion being erroneous and service on him being effected the only point is whether it binds the Railway Company. It is admitted that at the time of the orders the moneys in question were under the control, not of the auditor, but of the Agent of the Company without whose sanction payment to the defendant could not be made.

It is contended under O. 21, R. 46 (i), that as the company was the debtor the order should have been addressed to the company, that is the same officer of the company as specified in O. 29, R. 2, read with O. 48, R. 2, among which the auditor does not appear. It is also pointed out that though under O. 21, R. 48, the auditor has been notified as the officer to whom notice should be sent of orders attaching salary or allowances of railway employees, that does not extend to security deposits. On the other hand, it is admitted that the auditor is the only disbursing officer of the railway and that when the Agent has sanctioned the repayment of a deposit he is the officer who actually makes the payment. That being so the prohibitory order would operate to forbid him to make that payment on receipt of the Agent's sanction, notwithstanding that at the date of its service upon him he was not yet in a position to make the payment for want of that sanction. There can be no doubt that under ordinary circumstances he is not empowered to disburse the salary of an employee still in the company's employ before the end of the month in which it is earned; yet, if during that month he received an order attaching that salary, it cannot be contended that he would not be bound to give effect to it when salary came to be disbursed and if he disregarded it, the company could not be held liable for his default. Similarly in the present case he, as the disbursing hand of the company, having paid out moneys after receipt of lawful order not to pay them, I consider that the company are liable to make good the result of his action. The application is dismissed with costs; advocate's fee two gold mohurs.

K.N./R.K. *Application dismissed.*

A. I. R. 1914 Lower Burma 216

HARTNOLL, OFFG. C. J. AND TWOMEY, J.

Kya Nyun—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 524 of 1913, Decided on 12th August 1913.

(a) Criminal P. C. (5 of 1898), S. 290—Omission to direct jury to consider intention in trials of offences under Ss. 302, 304 and 326, I. P. C.—Charge is defective.

In a trial under Ss. 302, 304 and 326, I. P. C., the charge to the jury is defective in law where it does not sufficiently ask the jury to consider the intention of the accused. [P 218 C 1]

(b) Penal Code (45 of 1860), Ss. 302, 304 and 326 — Jury must consider accused's frame of mind and nature of weapon used —Intention should be ascertained from acts —Eyewitnesses should be examined in detail.

The considerations that should guide the jury in arriving at the intention of the accused are the accused's frame of mind, the nature of the weapon used and also the number and nature of the wounds. For the ascertainment of intention the eye-witnesses should be examined at length as to how the accused at the time of inflicting the injury exactly acted. [P 218 C 1, 2]

May Oung—for Appellant.

Maung Kin—for the Crown.

Hartnoll, Offg. C. J.—The appellant was charged under two heads: (1) with the murder of Ma Shan Ma under S. 302, I. P. C., and (2) with voluntarily causing grievous hurt to Ma Yin Kywe under S. 326, I. P. C. He has been convicted of the murder of Ma Shan Ma and sentenced to death and with voluntarily causing hurt to Ma Yin Kywe, no sentence being passed for this crime in view of the sentence of death.

He was tried by the learned Sessions Judge and a jury, and on appeal it is urged that the jury was not fully directed in law and also that no sufficient answer was recorded to a question asked them. The heads of charge show that Ss. 299, 300, Cls. 1, 2, 3, and 4 of that section, and S. 304, I. P. C., were read, and it was explained to the jury that the clauses of S. 300 which should be applied to the case were Illus. 1 and 3 and also S. 304. Illus (a) and (c) S. 300, were read to the jury. Ss. 39, 322, 324 and 326 were also read to the jury. These were apparently read in connexion with the charge under S. 326.

Other sections were also read, but these seem to have been read with reference to two men jointly tried with appellant for abetment. These men have been acquitted.

The case alleged against Maung Kya Nyun is that he had a quarrel with one brothel-keeper named Po Shein in the afternoon of 1st January 1913, and in the evening about 8 p. m. he went to the brothel to cause him injury with a knife. Po Shein was not at home, but the women Ma Shan Ma, Ma Yin Kywe, Ma Thein and Ma Nawe Thin were in his room. Not finding Pa Shein he stabbed Ma Shan Ma and Ma Yin Kywe. Ma Shan Ma died almost at once. She had a wound penetrating her chest to a depth of 3¾ inches and two serious stabs on her right arm. Ma Yin Kywe had one wound 1-1/2 inches deep nearly penetrating the chest cavity and four wounds on her left thigh, two of them being serious. In the charge the Sessions Judge drew attention to the injuries inflicted. In concluding his charge he said: "If you consider that the man who stabbed deceased with the intention defined in Cl. 1 or 3, S. 300, I. P. C., then the offence committed is murder. If on the contrary you consider that the man stabbed deceased with the knowledge that he was likely to cause death but without any intention to cause death or to cause such bodily injury as was likely to cause death, then the offence committed would be culpable homicide not amounting to murder as defined in the second portion of S. 304, I. P. C." The jury in reutrning their verdict said: "We find accused 1 guilty of having stabbed Ma Shan Ma with intent to cause serious injury, but whether with intent to cause death we cannot say. We do not know what offence he should be held to have committed." A question was then put to them under S. 303, Criminal P. C., namely: "Do you consider that accused 1 stabbed deceased with the intention of causing bodily injury and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death? Illus. (c): *A* intentionally gives *Z* a sword or club wound sufficient to cause the death of a man in the ordinary course of nature. *Z* dies in consequence. Here *A* is guilty of murder although he may not have intended to cause *Z's* death. I want you to consider whether Kya Nyun's conduct in stabbing Ma Shan Ma amounted to this."

The answer is recorded: "The jury return a unanimous verdict that accused 1 is guilty of murder in causing the death of Ma Shan Ma."

It is contended that the jury were not asked to consider the alternative finding that appellant stabbed Ma Shan Ma with the intention of causing such bodily injury as was likely to cause her death. This contention appears to be correct. If the jury had come to such a finding, it would have amounted to one of culpable homicide not amounting to murder punishable under the first part of S 304, I. P. C. The learned Judge seems to have considered that the case might be one in which the jury were at liberty to return a verdict of culpable homicide not amounting to murder, for he said: "If you consider that the man stabbed deceased with the knowledge that he was likely to cause death, but without any intention to cause death or to cause such bodily injury as was likely to cause death, then the offence committed would be culpable homicide not amounting to murder as defined in the second portion of S. 304, I. P. C." This was a misdirection, as this case is not one to which the second part of S. 304, I. P. C, is applicable. I would especially invite the attention of the learned Sessions Judge to the passage in *Shwe Ein* v. *Emperor* (1) dealing with the cases stated in Ss. 299 and 300, I. P. C., in which "knowlege" is made the determining constituent of the offence. This case is one in which an intentional act to cause bodily injury to another is alleged.

I have read the proceedings of the trial and have come to the following conclusion: The jury were not charged in law as they should have been. They should, in my opinion, have been directed as follows: The first two alternatives of S. 299 and Cls. 1 and 3, S. 300, should have been read to them. Hurt, grievous hurt and the offence of voluntarily causing grievous hurt with a dangerous weapon should have been explained to them. The meaning of "intention" should then have been explained and they should have been told that a man is assumed to intend the natural or necessary consequences of his own

(1) [1906] 3 L. B. R. 122=3 Cr. L. J. 355.

act, a simple illustration being given. It does not appear that the meaning of "intention" was ever explained.

They should then have been asked, in the event of their finding that appellant stabbed Ma Shan Ma and caused her death, to also find his intention.

(1) Did be stab with the intention of causing death? If so, their verdict would be murder under S. 302, I. P. C.

(2) Did he stab with the intention of causing bodily injury sufficient in the ordinary course of nature to cause death? If so, their verdict would be murder.

(3) Did he stab with the intention of causing only such bodily injury as was likely to cause death? If so, their verdict would be culpable homicide not amounting to murder punishable under the first part of S. 304, I. P. C., or;

(4) Is he gulity of voluntarily causing grievous hurt by means of a dangerous weapon? If so, their verdict would find so under S. 326, I. P. C.

Where I think the charge is defective in law is that it does not sufficiently ask the jury to consider appellant's intention. Did he deliberately aim a blow at Ma Shan Ma's chest or at any vital part of her trunk? If so, he aimed at a vital part with a deadly weapon and they would be justified in finding that he intended to cause death or bodily injury sufficient in the ordinary course of nature to cause death. Or did he stab Ma Shan Ma without deliberately aiming at vital parts? If so, what was his intention and what considerations should guide the jury in arriving at it? There is his frame of mind as shown by his not only stabbing Ma Shan Ma but also Ma Yin Kywe, if they believe he did do so. There is the nature of the weapon used, also the number and nature of the wounds. Besides the chest wound Ma Shan Ma had two wounds two inches deep on her arm, which would be on a level with her trunk if her arms were bent up to protect hereslf when stabbed. Ma Yin Kywe was stabbed on the breast and two of the wounds on her thigh were 1 inch and 1-1/4 inches deep respectively. The stab in her breast was 1-1/2 inches deep and if it had gone a little deeper might have been fatal. What was the frame of mind of the man who inflicted such injuries and in such numbers, and what must be presumed to be his intention? Was it to cause death or bodily injury sufficient in the ordinary course of nature to cause death? If so, the jury would be justified in returning a verdict of murder. Or if so grave an intention was not to their minds to be inferred, was not there at least an intention to cause such bodily injury as was likely to cause death? If so they would be justified in returning a verdict of culpable homicide not amounting to murder. If they do not find that he even had this intention, was his offence one of voluntarily causing grievous hurt by means of a knife? When he stabbed, did he intend or know himself to be likely to cause grievous hurt? If the jury found so, they would be justified in finding him guilty under 326, I. P. C.

I also think that the eyewitnesses should have been examined more at length so as to ascertain what his intention was. They should have been asked how he stabbed? Did he deliberately aim at Ma Shan Ma's and Ma Yin Kywe's chests? How did he exactly act?

In view of the fact that I think the inquiry should have been fuller in this respect and the magnitude of the issue involved, whether we have the power or not to go into the case on its merits, I do not think we should.

I would reverse the finding and sentence under S. 302, I. P. C., and order that Maung Kya Nyun be retried by the learned Sessions Judge on a charge of murdering Ma Shan Ma punishable under S. 302, I. P. C.

Twomey, J.—I concur.

K.N./R.K. *Retrial ordered.*

A. I. R. 1914 Lower Burma 218

TWOMEY, J.

Mg. Tha Zan and *another*—Appellants.

v.

Mg. Ba Gale alias *Mg. Bu* — Respondent.

Criminal Revn. No. 84-B of 1914, Decided on 25th May 1914, from order of Sub-Divl. Magistrate, Nyaunglebin, D/- 10th February 1914.

Criminal P. C. (5 of 1898), S. 146 (b)—Refusal to hand over property attached under S. 146 (b) to successful party in civil Court on ground of appeal by other party, is ulta vires —Chief Court can set aside order under Criminal P. C., S. 435 (3).

A Subdivisional Magistrate attached certain lands and appointed a receiver under S. 146

(2), till a competent civil Court would determine the rights of the parties, but refused to make over the possession to the successful party when the District Court determined the rights of the contesting parties on the ground that the losing party was going to appeal to the Chief Court:

Held: that the Subdivisional Magistrate's order was clearly without jurisdiction, as a Magistrate ceases to have authority to retain the property after a competent civil Court determines the rights of the parties.

The Chief Court has power to annul such orders in revision under S. 435 (3). [P 219 C 1]

Palit—for Appellants.

Hla Baw—for Respondents.

Order. — The Subdivisional Magistrate attached the lands—some 300 acres—in this case until a competent Court should determine the rights of the parties. A receiver was appointed under S. 146 (2), Criminal P. C. The respondent Mg. Ba Gale's claim to possession was based on an alleged agreement to sell the lands to him for Rs. 15,000. He brought a suit in the Distrlct Court claiming specific performance of the alleged agreement and the District Court has dismissed the suit. The only other claimants are the applicants, Tha Zan and Tun Myin, who admittedly bought the lands from the former owner. When the District Court had passed orders dismissing Ba Gale's suit Tha Zan and Tun Myin applied to the Subdivisional Magistrate for possession. The Subdivisional Magistrate refused on the ground that Ba Gale was appealing to the Chief Court. This is not a valid reason at all. The dispute having been determined by a competent Court the Subdivisional Magistrate has no option but to give possession in pursuance of that determination.

It is urged that this Court has no power to grant the present application in revision because proceedings under Ch. 12, Criminal P. C., are not subject to revision under S. 435 (3).

But this is clearly a case in which the Subivisional Magistrate's order is passed without jurisdiction. Once the civil Court has determined the right of the parties the Magistrate ceases to have any authority to retain control of the property. I think it is within the power of this Court to annul a Magistrate's order which is on the face of it ultra vires. The Subdivisional Magistrate's order of 10th February 1914 is set aside, and it is ordered that the lands which were attached by the Subdivisional Magistrate shall be made over to the applicants.

K.N./R.K. *Order set aside.*

A. I. R. 1914 Lower Burma 219
Full Bench

HARTNOLL, OFFG. C. J.,
ORMOND AND TWOMEY, JJ.

In re *Chet Po.*

Civil Reference No. 5 of 1913, Decided on 29th July 1913, made by the Officiating Financial Commissioner, Burma, under S. 57, Stamp Act.

Stamp Act (2 of 1899), S. 2 (12)—"Execution"—Unsigned document is not liable to stamp duty.

Under S. 2 (12), Stamp Act, the word "execution" means "signature." An instrument which becomes chargeable with stamp duty only on being executed is not liable to duty until it is signed. The fact that an unsigned document is not liable to stamp duty as an executed document does not necessarily imply that the document is incomplete for the purpose for which it was drawn up. [P 220 C 1]

Higginbotham (Govt. Advocate)—for the Crown.

Judgment.—The question on which the learned Officiating Financial Commissioner desires a ruling under S. 57, Stamp Act, is not precisely formulated in the order of reference, but may perhaps be stated as follows:

"Can an unsigned instrument written on parabaik be held liable to duty under the Stamp Act, 1899?"

The fact that an instrument is written on parabaik or palm leaf is, of course, immaterial. "Paper" is defined in the Stamp Act as including vellum, parchment or any other material on which an instrument may be written. Before the British annexation it was the universal custom in Upper Burma to make all documents without signature. Under the Burmese law and practice, signatures were absolutely unknown: see the Upper Burma Rulings, 1892-96, vol. I, p. 303, and vol. 2, p. 462. The English practice of affixing signatures has been adopted gradually since the annexation, but the old custom continued for many years and probably persists still in remote parts. The document out of which the present reference arose is dated 10th Waning Nayon, 1262 B. E. (21st June 1900).

A document though not yet executed may be an instrument. But as a general rule instruments become chargeable with

stamp duty only when they were executed : S. 3, Stamp Act. It was held by the Judicial Commissioner, Upper Burma (Mr. Burgess), in 1893 (in the first case cited above) that signature was not necessary for the completion or execution of Burmese instruments. The custom of the country was to regard them as complete without signature and the Stamp law as it then stood (Stamp Act, 1879), presented no obstacle to the recognition of this practice, for it contained no definition of "executed" and execution. Moreover, under the English law, signature was not essential for the execution of instruments under seal, though necessary in the case of instruments not under seal : S. 122, Stamp Act, 1891.

But the present Indian law is different. The Stamp Act, 1899, expressly defines words "executed" and "execution" as meaning "signed" and "signature" : (S. 2 (12). Unsigned Burmese instruments made since that Act came into force, i.e., since 1st July 1899, cannot be treated as executed for the purpose of the Stamp law. Our answer to the present reference is therefore as follows:

"As 'execution' means 'signature' under S. 2, Stamp Act, 1899, an instrument which becomes chargeable with stamp duty only on being executed is not liable to duty until it is signed."

In accordance with the universal custom referred to above, formal documents on palm leaf and parabaik have hitherto been treated by the Courts in Upper Burma as completed documents and admitted in evidence as such though they are not signed. Our decision that these unsigned documents are not liable to stamp duty does not necessarily imply that they must henceforward be regarded as incomplete. The effect of the present decision is only that the Courts cannot refuse to admit any such document in evidence merely on the ground that it is unstamped.

V.B./R.K. *Reference answered.*

A. I. R. 1914 Lower Burma 220

TWOMEY, J.

Nga Tha Yin—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 281 of 1914, and Criminal Revision No. 202-A of 1914, Decided on 11th June 1914.

(a) Penal Code (45 of 1860), Ss. 24 and 420—Person by obtaining lottery prize by false representation does not cause wrongful loss to real winner but acts dishonestly within meaning of S. 24.

A person, who by falsely pretending to be the winner of a lottery prize dishonestly induces the lottery officials to pay the prize to him, does not cause "wrongful loss" to the rightful winner of the prize; but causes a "wrongful gain" to himself by obtaining by false pretence what he is "not legally entitled" to and therefore he acts "dishonestly" within the meaning of S. 24, I. P. C. [P 220 C 2]

(b) Criminal P. C. (5 of 1898), S. 545 (a) and (b)—Compensation for expenses can be awarded under Cl. (a), but not under Cl. (b) where it is not realisable in civil Court.

Where a complainant cannot recover substantial compensation in a civil Court, compensation cannot be awarded to him under Cl. (b), S. 545, but a sum may be awarded to him under Cl. (a) of the section to defray the expenses of the prosecution. [P 223 C 2]

(c) Criminal P. C. (5 of 1898), S. 517—Order under S. 517 passed to refund amount fraudulently obtained by accused.

The Chief Court, in the exercise of its revisional powers, ordered, under S. 517, the appellant who had received money by false pretence from the lottery officials to refund the money to the lottery officials, and directed the Magistrate to recover it in the manner provided for the recovery of fine. [P 224 C 1]

May Aung and *Ba Dun*—for Appellant.

Agabeg—for the Crown.

Judgment.—The appellant Tha Yin, a goldsmith's assistant living at Paungdawthi, has been convicted of cheating under S. 420, I. P. C., by deceiving the Indian Telegraphic Association Club, dishonestly inducing them to pay him Rs. 72,820 as the rightful owner of Sweep Ticket No. 7164 which drew the first prize in the Sweep of June 1913, and thereby causing wrongful loss to the owner of the ticket, a master goldsmith named Maung San Ya, also living at Paungdawthi.

No exception has been taken to the form of the charge. At the same time, I think the correct view of such a case as this is not that the false claimant causes "wrongful loss" to the rightful owner of the ticket, but that he causes "wrongful gain" to himself. For it is clear that the false claimant is "not legally entitled" to the prize money which he obtains by his false pretence and therefore he acts "dishonestly" within the meaning of S. 24, I. P. C. He also causes "wrongful loss" to the lottery officials whom he induces to pay away the money to him.

It is a point in appellant's favour that he was adjudged the right owner by the Indian Telegraphic Associction officials in preference to Maung San Ya. But it is clear that the inquiry held by these officials was of a perfunctory character.

It is a difficult case, but the Sub-divisional Magistrate has recorded the evidence with great care and has sifted it throughly in an exhaustive judgment.

The question in this appeal is whether the prosecution succeeded in proving beyond reasonable doubt that San Ya was the rightful owner of Ticket No. 7164 and that Tha Yin's claim was false. The ticket came out in the name of " Ko Tha Ya, Padeinsaya, Paungdawthi, " the nom de plume being " Patmapeba. " The prosecution case is that San Ya's wife Ma Hnin Get went to the post office and remitted the money for this ticket and that the postmaster, a Bengali. wrote the name Ko Tha Ya in mistake for Ko San Ya. Neither party produced the receipt for the money order which would have been very good evidence as to who the remitter was. But the postal acknowledgment was admittedly delivered to Mg. San Ya. The ticket did not come to him and it is alleged that his wife went to the Post Offioe several times to inquire about it and at length got the postmaster to write a complaint about its non-arrival to the Telegraphic Association Club. The postmaster supports her, but the actual complaint could not be traced in the Telegraphic Association Club records and the Magistrate did not find it established beyond doubt that such a complaint was really sent. Meanwhile the cover containing the ticket for " Ko Tha Ya" had arrived at Paungdawthi in due course and had been delivered to some one in the house of Maung Ba master goldsmith, under whom the appellant Tha Yin was working.

San Ya and Tha Yin are not the only claimants. The case was complicated by the claim of a third person, the goldsimth Maung Ba Maung, Tha Yin's employer, who stated that Tha Yin sent the money order for him.

The Magistrate inquired separately into Maung Ba's complaint against Tha Yin. He found that Maung Ba was also a false claimant and discharged Tha Yin in that case. It would certainly have been better to treat the two cases in one trial as arising out of the same transaction especially as it is part of the prosecution case that Tha Yin at first acted in the matter merely as Maung Ba's tool, and only later on set .himself up as the true owner in opposition to both San Ya and Maung Ba. The grounds on which the Magistrate has held San Ya's claim to be proved and Tha Yin's to be false may be briefily summarized. A ticket had been taken also in the previous month's Sweep in the name of Ko's Tha Ya, "Padeinsaya," and it is in the highest degree probable that the person who sent the money for that ticket was the same person who sent the money for the ticket in June. San Ya's wife Ma Hnin Get said that she took the May ticket and the Magistrate found this to be true. Ma Hnin Get's statement received strong corroboration from the counter foils of the money order book in the post office showing that certain persons, whome she named as being present when she got her money order in May, actually got money orders about the same time. This piece of evidence was discovered by the Magistrate himself and was not preferred by the prosecution. I think that very great weight attaches to it.

There is nothing improbable in the Indian postmaster writing Tha Ya in mistake for San Ya. It is shown that he was very careless .in transliterating Burmese names. I cannot ·attach much weight to the agrument as to the Burmese and Bengali alphabets. It may be that Mohamed Ali would be more likely on the whole to write "Chand" than "Tha" in mistake for "San." But the mistake "Tha" for "San" is certain within the wide range of his capacity for error.

The May ticket was issued with the nom de plume " Kanchantha " whereas Ma Hnin Get says she gave the nom de plume " Mya Get. " The Magistrate finds that this was probably due to some mistake in the Indian Telgraphie Association office and instances are given of equally bad mistakes. It cannot be doubted that the person who bought the May ticket bought the June ticket also and the appellant accordingly made a strenuous effort to prove that it was he who had bought the May ticket with the nom de plume of " Kansantha. " He produced two witnesses, Kan Tha and

San Mya, who say that they took the ticket jointly with him and so gave the nom de plume of "Kansantha" combining the names of all three partners. This story is plausible. But the Magistrate thought that it might easily have been invented. And so it might be Tha Yin found that "Kan Chan Tha" was the nom de plume of the May ticket issued to Ko Tha Ya. The appellant had a long time to prepare his defence and he had his pocket full of money. Kan and San are common components of Burmese names and every Burmese youth has friends and acquaintances into whose names these components enter. The story is refuted by the evidence of the Inspector of Post Offices, Maung Lu Gale, a witness who appears to be above suspicion and who states that in the departmental inquiry held by him, Tha Yin said he took no ticket before the June ticket.

Tha Yin said that when he went to send the money order in June the money was actually handed in for him at the Post Office by a friend Po Bein, and Po Bein supports him. But Po Bein's evidence is clearly untrustworthy, for in the departmental inquiry he informed the Inspector of Post Offices that he knew nothing about sending the money for the ticket. It appears that he made a similar statement to the police. Moreover, when Tha Yin claimed the ticket from Pakirisawmy at the Post Office he did not bring forward Po Bein as a man who had actually bought the money order for him and who had actually given the name Ko Tha Ya Padeinsaya and the nom de plume Patamapeba. It would clearly have helped him materially to get the ticket if he had produced Po Bein to prove these facts. The omission cannot be explained except on the assumption that Po Bein was not yet ready to give this evidence.

The Post Master, Mahomed Ali, gave evidence that Po Bein obtained a money order for another Burman, but Mahomed Ali could not identify Tha Yin as the other Burman. The Magisrate has given good reasons for rejecting Mahomed Ali's evidence alsogether.

On the other hand, Ma Hnin Get's statement that it was she who paid for the money order in June is corroborated by the evidence of the postman, Santoo, which is in turn corroborated by the money order counterfoil book, showing that the money order bought by Ko Tha Ya was issued just at the time when Santoo was himself depositing money in the Post Office.

There is evidence that Tha Yin was also called by the name Tha Ya in his childhood in another village. But it is proved that he was known only by the name of Tha Yin in Paungdawthi. I agree with the Subdivisional Magistrate in thinking it very unlikely that he would revert to the name of his childhood in buying a ticket for the sweep. Why should he give a name which would render his identity as the sender of the money disputable? I can understand his taking a lucky name or phrase as nom de plume. But in giving the name and address to which the ticket is to be delivered one would expect him to give the name by which the Postal Officials and all other persons knew him at Paungdawthi. It seems very unlikely that he would give a name by which no one at Paungdawthi knew him. It also seems unlikely that Po Bein, who according to Tha Yin paid in the money for him at the Post Office, would not draw attention to the discrepancy, for Po Bein admits that he knew Tha Yin only as Tha Yin.

It is also unlikely, as the Magistrate observes, that the Post Master would have prefixed "Ko" to the name of a mere stripling like the appellant, and that the appellant would describe himself as "Padeinsaya." There is some evidence that he did work as a goldsmith for a short time on his own account. But it is clear that in Paungdawthi he was not working on his own account but merely as one of Maung Ba's hands. Po Khu, a fellow-workman of the accused, did not describe himself as a Padeinsaya in buying tickets for the sweep and it is highly improbable that Tha Yin would so describe himself.

I see no reason to dissent from the Magistrate's conclusions as to the circumstances under which the ticket was given up to the Post Master, Pakiriswmy, by the witness Po Kyu on 26th June and I think there can be no doubt at all that the Station Master, Nurul Haq, and Po Yin and Po Bein did assure Pakirisawmy on 28th June that they knew Tha Yin to be "Ko Tha Ya," though they really knew him as only Tha Yin. This circumstance furnishes additional

reason for distrusting the witness Po Bein (who admittedly had never known Tha Yin by any other name). It shows also that the witness, Nural Huq, is not to be trusted.

It is clear that Nural Huq did not know Tha Yin by the name of his childhood days. The fact that Nural Huq refers to Tha Yin as Ko Tha Ya in the letter to the Post Master, Ex. 1, only shows that at that early stage he had been enlisted by Tha Yin to support his claim.

The Magistrate has analyzed at some length the evidence produced by the defence to show that Tha Yin was absent from Paungdawthi at a funeral on 26th June. It was necessary for the appellant to establish an alibi in order to account for the fact that he did not himself go to the post office with the ticket on 26th June, the day that Po Kyu took it there. The evidence on this point is very conflicting and I think it cannot be said to be proved beyond doubt that Tha Yin was in Paungdawthi on 26th June. But the point is not one of essential importance, though it would have added to the strength of the prosecution case if Tha Yin were clearly proved to have been in Paungdawthi on the 26th.

It appears likely that San Ya, when he claimed the money at the Indian Telelegraphic Association Club, said he was known also as Tha Ya. But it does not follow, in my opinion, that he said so with any dishonest intention and it cannot affect the case against the appellant.

I can attach no importance to the denials of the witness, Po San, who admitted at an earlier stage that he was with Ma Hnin Get both when she sent the money for the ticket and when she sent her complaint about its non-arrival. In spite of the lacunas in the evidence produced by the complainant I think the prosecution established the fact that he was the rightful owner of the ticket No. 7164. I agree with the Magistrate that Ma Hnin Get is proved to have sent the money for both the tickets issued in the name of "Ko Tha Ya Padeinsaya." On the other hand the appellant by his own admission to the Inspector of Post Offices bought no ticket at all in May and the evidence as to his sending money for a ticket in June appears to be fabricated. I think the appellant has been rightly convicted.

The Magistrate has sentenced him to rigorous imprisonment for two years and a fine of Rs. 1,000 (the maximum fine which can be imposed by a 1st class Magistrate), or in default rigorous imprisonment for a further term of six months.

The object in imposing this large fine is seen from the Magistrate's further order awarding Rs. 900 of it to the complainant as compensation. But the compenastion cannot be awarded under S. 545 (b), Criminal P. C. unless substantial compensation is recoverable in a civil suit. In this case, San Ya could not recover compensation in a civil suit. The order as to compensation is therefore bad. A sum out of any fine imposed could however be awarded to him under S. 545 (a) to defray the expenses of the prosecution.

The appeal is dismissed and Tha Yin is re-committed to jail to undergo his sentence, the order awarding Maung San Ya Rs. 900 out of the fine of Rs. 1,000 under S. 545 (b) is set aside, and instead I award him a sum of Rs. 250 under S. 545 (a) to meet the expenses of the prosecution. The Magistrate omitted to pass orders regarding the disposal of the money, Rs. 72,820, with respect to which the offence of cheating was committed. I propose to pass orders under S. 517, Criminal P. C., in exercise of the revisional powers of this Court. It is clearly wrong that the accused should be left to enjoy the fruits of his crime when he emerges from jail and I propose to prevent it so far as I can.

Criminal Revision No. 202-*A of* 1914.

Order.—In exercise of the revisional powers of the Court I call upon the accused Tha Yin to show cause why he should not be ordered to refund to the Indian Telegraphic Association Club the amount of the prize money, Rs. 72,820, which the club officials erroneously paid to him in consequence of his false pretence that he was the rightful owner of the winning ticket No. 7164 in the Sweep of June 1913. This money is the property regarding which the offence of cheating was committed. The Court has power under S. 517, Criminal P. C., to pass orders as to the disposal of the money.

The accused Tha Yin on being called upon to show cause as above states that he is the real Tha Ya and on that ground he should not be required to refund.

It has been found by the Subdivisional Magistrate and by this Court that Tha Yin obtained the money from the Indian Telegraphic Association Club by a false pretence. I now direct that he shall refund the money to the Indian Telegraphic Association Club. If the club are unable to recover it they may apply to the Magistrate who will proceed to recover the money from Tha Yin in the the manner provided for the recovery of fines and on recovery will pay the money to the Indian Telegraphic Association Club.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Lower Burma 224

HARTNOLL AND TWOMEY, JJ.

A. J. Robertson—Applicant.

v.

Ko Cheik and *others*—Opposite Party.

Civil Revn. Petn. No. 186 of 1913, Decided on 24th June 1914.

Contract Act (9 of 1872), Ss. 171, 217 and 221—Amount deposited in excess, through mistake in decree, by barrister under profit—Excess amount attached—Barrister cannot have any equitable lien as it was not fruits of any order obtained—No lien under Ss. 171, 217 and 221—As no reference to fees was made while depositing, deposit held could not be regarded under protest.

In satisfaction of a decree a large sum was paid into Court, through a barrister, under protest saying that owing to a mistake in the decree more money was deposited than was actually due under is. This sum was afterwards attached in execution of another decree against the judgment-debtor in the first decree. The barrister claimed a lien over portion of the sum deposited.

Held: that the barrister had no lien against the sum under Ss. 171, 217 and 221; that the rule of solicitor's equitable lien in England did not apply to the case, the Barrister having obtained no decree in favour of his client, and there being no fruits to obtain a lien on; that as the barrister had parted with the possession of the money without making any reference to his lien for fees, the amount of fees could not be regarded as having been paid in under protest. [P 224 C 2, P 225 C 1]

Hartnoll, J.—A mortgage decree was passed against Mr. Robertson's clients, Maung Kala and Ma Gauk, and in satisfaction thereof it is stated that Rupees 9,395-9-10 was paid into Court. Mr. Robertson states that this included a sum of Rs. 402 over and above what was due, owing to a mistake in the decree, and that it was paid in under protest. This sum has now been attached in execution of a decree obtained in another suit against Maung Kala and has been paid out in pursuance of that attachment; but Mr, Robertson claims a lien over Rs. 217 of it as being due to him on account of his fees.

Firstly, in support of his claim he urges that he has an equitable lien over it, and he relies on what is called the solicitor's equitable lien in England. The nature of this lien is given at p. 23, Vol. 19, Halsbury's Laws of England, and is stated as follows: "A solicitor is entitled not only to a Common law lien for his charges upon documents in his possession belonging to his clients, but also to a lien of an equitable nature upon the fruits of judgments and orders obtained by him in favour of his clients in the suit in which he was employed for his costs in that suit."

Now apart from the fact that Mr. Robertson is a barrister-at-law and a general law agent both acting and pleading for his clients, the above rule cannot be held to apply to this case. He obtained no decree in favour of his clients and there were no fruits to obtain a lien on. The question therefore whether the rule shonld be applied to men like Mr. Robertson in this country need not be considered. He can quote no law nor rule giving such a lien in this country. His claim on the first ground put forward by him must fail.

His next ground is that he has a lien on the Rs. 217 by virtue of Ss. 171, 217 and 221, Contract Act; but he did not retain the Rs. 217 in his possession. He paid it into Court. He says that he paid it in under protest but explains that his protest was not that he had such a lien as he claims on it but was merely a protest on behalf of his clients that they were paying in Rs. 402 more than was due by them. This protest on behalf of Mr. Robertson's clients was clearly no bar to the attachment of the extra money by the clients' creditors.

No protest was made as to Mr. Robertson's lien for fees, Rs. 217, included in the sum of Rs. 402. Seeing that he parted with possession of the money without making any reference to his lien for fees, I do not think we can regard

the amount of the fees as having been paid in under protest.

I would therefore dismiss this application.

Twomey, J.—I concur.

K.N./R.K. *Application dismissed.*

A. I. R. 1914 Lower Burma 225

ORMOND AND PARLETT, JJ.

Mahomed Ebrahim Saib Khateeb—Plaintiff—Appellant.

v.

Maung Ba Gyaw—Defendant—Respondent.

First Appeal No. 185 of 1911, Decided on 30th January 1914, from judgment and decree of Dist. Judge, Hanthawaddy, in Civil Suit No. 52 of 1911.

Transfer of Property Act (4 of 1882), S. 41—Purchaser of land paying off mortgage over land due from vendor and his father—Knowledge of mortgage by father deprives purchaser of status as bona fide purchaser—Admissions of interest of father in mortgage could be rebutted—Purchaser could not amend suit of possession to one for declaration for charge for money spent—Civil P. C, O. 6, R. 17—Evidence Act, S. 18.

A purchaser of land at the time of his purchase paid off the mortgage money due under a deed executed by the vendor and his father in respect of the land. The father lived in a house on the land. The purchaser sued for possession:

Held: that the purchaser was put by the deed upon his inquiry as to the interest of the father in the land and under the circumstances could not assume the position of a bona fide purchaser from the ostensible owner. The statements in the mortgage deed as to the interest of father and son would be simply admissions which could be rebutted by evidence: the plaintiff could not allowed to amend his plaint by adding a prayer for declaration as to his right of charge upon the property to the extent of the mortgage money paid by him to the mortgagee. [P 225 C 2]

Dantra—for Appellant.

P. N. Chari—for Respondent.

Ormond, J.—The plaintiff-appellant sued for possession of two plots of land. He bought the land for Rs. 20,000 from the defendants' son. The land stood in the son's name in the revenue registers and the son had a landholder's certificate. The defendant, who is a retired myook, says that the land is his; that the son had no power to sell it and that he, the defendant, is in possession.

The plaintiff employed Mr. Dhar, the conveyancer, to investigate the title. During that investigation Mr. Dhar perused a mortgage deed in respect of this land executed by the father and the son in favour of the Chetty whose mortgage for Rs. 10,000 was paid off at the plaintiff's purchase from the son. The plaintiff alleges that he went on the land and inquired from some Punjabis (who were tenants in certain of the houses) and was satisfied that the son was in possession. The plaintiff did not go to the Thugyi to make inquiries and there can be no doubt that the defendant was living in a house on the land. The Thugyi, who is the collector of the municipal taxes and income-tax, gives evidence and states that the defendant paid the municipal taxes and that he was assessed to the income-tax upon the rents received from the house on the property. The son is a clerk upon a salary of Rs. 45. The plaintiff does not allege that the defendant authorized the sale and he admits that after the sale he went to the defendant who repudiated the sale. In my opinion the defendant has proved that he is the real owner, and the fact that by the mortgage deed which was brought to plaintiff's agent's notice in which the father is mentioned as being interested in the property the plaintiff was put upon his inquiry. The plaintiff therefore cannot assume the position of a bona fide purchaser from the ostensible owner and he only bought the son's interest in the property which was nil. Mr. Dantra for the appellant then contends that the father is estopped by the mortagage deed from saying that the son was not an owner to the extent of one half, but the statements in the mortgage deed would be admissions which can be rebutted by evidence and the evidence shows that the son had no beneficial interest in the property. Mr. Dantra then contends that the father being the sole owner and his mortgage (Rs. 10,000) having been paid off out of the purchase money, the plaintiff is entitled to stand in the shoes of the mortgagee and would be entitled to a declaration that he has a charge upon the property to that extent, and he asks leave to amend the plaint by adding a claim for such a declaration. That would be altering the nature of the suit and I see no reason for allowing such an amendment at this stage. The suit is one for possession and the plaintiff would not be entitled to possession in the character of a mortgagee. If his claim to stand in the mortgagee's shoes is barred by limitation, he would not be

entitled to have the plaint amended so as to include that barred claim and if the claim is not barred, there is nothing to prevent him from filing a fresh suit in respect of that cause of action.

I would dismiss this appeal with costs.

Parlett, J.—The appellant not only had indirect notice of defendant's claim to the land but there is evidence that he had direct notice of it, and he himself says that he saw a letter whereby defendant purported to authcrize his son to sell. It is clear that appellant was grossly negligent is not making effective inquiry into his vendor's title and that he bought no more than Tha Dun had to sell.

I agree that the evidence establishes that the land was defendant's sole property. Tha Dun was not called as a witness and there is no evidence that he had any interest whatever in the land. I concur in dismissing this appeal with costs.

K N./R.K. *Appeal dismissed.*

A. I. R. 1914 Lower Burma 226 (1)

TWOMEY, J.

Emperor

v.

Sulaiman—Opposite Party.

Criminal Reference No. 52 of 1913, Decided on 5th August 1913.

Criminal P. C. (5 of 1898), Ss. 423 and 438—Appellate Court must dispose of appeal under S. 423 and cannot refer question of law under S. 438.

When an appellate Court does not dismiss an appeal summarily, it must dispose of it in the manner provided by S. 423. It has no power to refer to the High Court for deciding a question of law arising in an appeal. [P 226 C 1]

Judgment.—In a criminal appeal now pending before the Sessions Judge, Tenasserim Division, a question of law has arisen as to the proper construction of S. 57, Excise Act. The learned Judge considers that it is an important question on which there should be an authoritative ruling and he has therefore referred it to this Court for decision.

When an appellate Court does not dismiss an appeal summarily, it is bound by the provisions of S. 423, Criminal P. C., which define its powers—these powers do not authorize the Court to refer to the High Court for decision a question of law arising in the appeal. Nor does S. 438, confer any such authority; that section permits the Sessions Judge to report for orders the result of his examination of any proceeding before an inferior criminal Court, but does not apply to appellate proceedings pending before the Sessions Judge himself. It is clearly the intention of the law that all questions arising in a criminal appeal should be determined by the appellate Court itself.

Since the question referred by the Sessions Judge is not properly before the Court no decision can be given on it. The learned Judge will have to decide it according to his own judgment. If either party should be aggrieved at the Sessions Court's orders in appeal, it will be open to that party to move this Court in revision if he thinks fit.

K.N./R.K. *Reference rejected.*

A. I. R. 1914 Lower Burma 226 (2)

HARTNOLL AND TWOMEY, JJ.

Mahomed Esoof and *others*—Appellants.

v.

Hajee Mahomed Esoof and *others*—Respondents.

Civil Misc. Appeal No 112 of 1913, Decided on 24th June 1914.

(a) Civil P. C. (5 of 1908), Ss. 92 and 93—Decision of question of election of trustee under a Court's scheme is appealable.

An appeal lies from the order of a Judge on the original side deciding the question as to the election of a trustee of a mosque under a scheme framed by the Court, as the proceedings would be proceedings in execution of the decree in the suit which originally sanctioned the scheme: 24 *Bom.* 45 and 28 *Mad.* 319, *Foll.* [P 228 C 1]

(b) Civil P. C. (5 of 1908), Ss. 92 and 93—Proceedings of election of trustee under S. 539 of the old Code must be summary and inexpensive.

The proceedings of the election of a trustee in pursuance of a scheme framed by the Court under S. 539, Civil P. C. (Act. 14 of 1882), should not be protracted. They should be as short, summary and inexpensive as possible. [P 228 C 1]

(c) Civil P. C. (5 of 1908), Ss. 92 and 93—How scheme framed under S. 539 of the old Code shold be construed pointed cut—Suit to amend scheme lies.

The doubtful and defective provisions of a scheme framed under S. 539, Civil P. C. (Act 14 of 1882), should be construed reasonably, but debateable points should not be worked out, nor should the scheme be modified in execution proceedings, though it is open to persons interested to bring a regular suit to have the scheme amended and the doubtful and defective matters made clear. [P 228 C 1, 2]

N. M. Cowasjee—for Appellants.

Alexander—for Respondents.

Hartnoll, J.—The matter to be decided in this appeal is whether the order of the learned Judge on the original side appointing one Ali Mahomed as a trustee

S. N. DAR, B. A. LL. B.,
Vakil High Court,
RANGOON

of the Moja Mosque, should be upheld or set aside. A scheme for the management of the mosque was sanctioned in Civil Regular No. 71 of 1905 of this Court on the 16th May 1910. That suit was brought by five persons interested in the management with the sanction of the Government Advocate against the then manager, now deceased, under the provisions of S. 539, Civil P. C. (14 of 1882), then in force. The scheme laid down the procedure to be followed in appointing trustees. There was a vacancy amongst the trustees to be filled and a meeting was called by the managing trustees on the 10th November 1912 to fill the vacancy. This meeting was held on the advertised date and two candidates were put up for election, Ali Mahomed and Abdul Wahid. One Shabadiru Naikwara took the chair. He was proposed and seconded to do so, and the proposal was carried unanimously. Before the voting took place the question of who were entitled to vote was raised. It was contended that not only members of the Jumaat but all Mahomedans born in Burma, whether they belonged to the Jumaat or not, should be allowed to vote. The Chairman said that he thought he had no power to decide who were eligible and arranged to note each vote which was objected to, leaving the matter of who were entitled to vote to be finally decided by the Court. According to the scheme the appointment of a trustee ultimately rested with the Court. The result of the voting was 586 votes for Ali Mahomed of which 474 were objected to and 368 votes for Abdul Wahid of which 190 were objected to. When the matter came before the Court the learned Judge directed the Chairman to report on the votes objected to:

1. Which of them were those of Narsapuris or Zarbadis of the Sunni faith residing in Rangoon and worshippers at the mosque.

2. Which of them were those of Narsapuris or Zarbadis of the Sunni faith residing in Rangoon but not worshippers at the mosque.

3. Which of them were those of Narsapuris or Zarbadis of the Sunni faith but not residing in Rangoon and not worshippers at the mosque.

4. Which of them were those of neither Narsapuris nor Zarbadis.

It was ordered that the Chairman was at liberty to base his decision or opinion on inquiry (if any) of any sort which he may deem fit to make. The Chairman made his report and by it found that out of the 474 votes for Ali Mahomed objected to, 433 were those of Narsapuris and one that of a Zarbadi residing in Rangoon and worshippers at the mosque, and that out of the 190 votes for Abdul Wahid objected to 182 were those of Zarbadis not worshippers at the mosque. It is unnecessary to go into other details of the Chairman's report. The appellants objected to the report and urged that the Chairman had classed as Narsapuris those who were not, that the votes of all Zarbadis should be allowed whether they were worshippers at the mosque or not, and that when the Chairman held his inquiries into the status of the voters, they had no opportunity to be present. According to the scheme the voters are to be Narsapuris and Zarbadis. It was claimed by appellants that a Narsapuri meant one born in Narsapur or a descendant of such person. The Chairman said that he had classed as Narsapuris those who came from Southern India districts surrounding Narsapur and that the term Narsapuri is not confined to those people who came from Narsapur itself any more than the term "Sooratee" is confined to those persons who came from Surat itself. The learned Judge would not accept the narrow meaning contended for the term "Narsapuri" by the appellants. He also said that under the scheme he thought it was intended that voters should be confined to worshippers at the mosque or, at all events, the vote of a regular worshipper should count very much more than the vote of a stranger. He also refused to appoint a Commissioner to go into the matter, as he said that for that purpose to take evidence that would be admissible under the Evidence Act would be an absurd course to adopt, that it would entail a great deal of expense and would widen the breach between the parties who worship at the mosque and the proceedings would be interminable. The Chairman's report gave Ali Mahomed a large majority and so he was appointed the trustee.

The first point for consideration in the appeal is whether it lies. The original suit was between persons interested in the management and the former manager. The present appellants are per-

sons interested in the management and they are bound by the decree in the suit. The present respondents are the trustees now. They are the successors of the former manager and are also bound by the decree. I consider that they are the rapresentatives of the former manager. In the case of *Damodarbhat* v. *Bhogilal Karsondas* (1) and *Prayag Doss Ji Varu* v. *Triumala Srírangacharlavaru* (2) proceedings such as the present one are pronounced to be proceedings in execution and there seems to be no good reason for differing from the view. That being so I consider that an appeal lies.

The same objections on the merits were taken before us as before the learned Judge on the original side. The scheme does not define what a Narsapuri is. Again it does not say that voters must be worshippers, but it does not at the same time lay down that all Zarbadis are entitled to vote whether they are worshippers or not. There are no provisions in the scheme to show how the voters' list is to be compiled. The question is whether these debateable points should be worked out and decided in the present proceedings which are whether Ali Mahomed should be appointed a trustee or not.

His appointment rests on the provisions of the scheme as it stands, as reasonable a construction as possible being given to it where its provisions are doubtful are defective. It is obvious that election proceedings of a trustee should not be protracted and drawn out by considerations as to the meaning of the term "Narsapuri", as to who is a regular worshipper at the mosque and who not. They should be as short, summary ond inexpensive as possible. Moreover, to pass decisions on the points raised by appellants would be tantamount to altering or adding to the scheme matters that cannot be dealt with in execution. For these reasons I am not disposed to disagree with the learned Judge on the original side in the conclusions he has drawn and in following the report of the Chairman. There is nothing to show that the Chairman has acted unfairly or with a bias in any way. He was unanimously elected to the chair and it was only after he submitted his report that his conduct was criticized. I would therefore dismiss this appeal with costs three gold mohurs advocate's fees being allowed.

At the same time I would say that it is open to persons interested to take legal steps to have the scheme amended so that doubtful and defective matters are made clear. They can take steps to have the term "Narsapuri" defined to have it decided whether only worshippers at the mosque should be eligible to vote and to have provision made for keeping a list of voters up to date. If the scheme be so amended it will simplify the way in which future elections are held.

Twomey, J.—The Bombay and Madras cases cited are good authority for the proposition that when a trust scheme has been framed by the Court the directions in the scheme may be enforced by the Court in execution upon application by persons interested. For example, according to the scheme now under consideration, if there is a casualty among the trustees, the continuing trustees are bound to take steps to fill the vacancy in the manner prescribed in Cls. 3, 4 and 5; and if they fail to do so any person interested may apply to the Court in execution to compel them to do so. But this is not a case in which the trustees have failed to carry out the directions in the scheme. They have complied with Cls. 3, 4 and 5 to the best of their ability and the authority designated in Cl. 4, viz., the principal Court of original civil jurisdiction, has appointed the person chosen at the meeting. It appears to me that the decision of that authority in the matter of an appointment is final and I see no reason to entertain an appeal from such an appointment as a matter arising in execution. On those grounds I would dismiss this appeal as proposed by Hartnoll, J. I would add that in my opinion, it is not open to persons interested to make a separate application to amend the scheme. Such an application may be admissible only if, as in the Bombay case, the scheme contained a clause providing for future modification. In the present case there being no such clause as this, I think the scheme can be amended only by means of a fresh suit.

K.N./R.K. *Appeal dismissed.*

(1) [1900] 24 Bom. 45=1 Bom. L. R. 509.
(2) [1905] 28 Mad. 319=15 M. L. J. 133.

A. I. R. 1914 Lower Burma 229
Full Bench

FOX, C. J., TWOMEY AND HARTNOLL, JJ.

Maung Shwe Po and *another*—Defendants—Appellants.

v.

Maung Bein and *another*—Plaintiffs—Respondents.

Civil Ref. No. 7 of 1914, Decided on 7th December 1914.

Buddhist Law (Burmese) — Succession—Auratha son gets only fourth share in property jointly acquired by father and mother if not partitioned before father's second marriage.

Where a Burmese Buddhist and his wife jointly acquire certain property and the wife dies leaving a son of the marriage and the husband marries again without partitioning the property with that son, the son is entitled only to a fourth share of the property as an auratha son and the father can dispose absolutely of the three-fourths of the property and a purchaser of the whole property takes the property subject to the auratha son's fourth share unless the son's right to claim is barred by limitation: 1 *L. B. R.* 23; (1892-96) 2 *U. B. R.* 171, 1 *L. B. R.* 50; *S. J. L. B.* 378 and 15 *I. C.* 919; *Ref.*

[P 233 C 1]

R. N. Burjorjee—for Appellants.

Ginwalla—for Respondents.

Order of Reference

Robinson, J.—Plaintiffs sued Maung Shwe Po, alleging that by a registered deed of sale dated 10th April 1908, he had sold them his land containing then 48·98 acres and now 51·81 acres and that he had now begun ploughing a part of the land. He asked for a perpetual injunction. Defendant replied that the land had belonged to him and his wife jointly. She died ten years ago leaving one son. The land was mortgaged in 1905 to a Chetty. In 1908 the Chetty was returning to India and wanted his money, so he got plaintiffs to pay the principal for him, he giving them a mortgage by conditional sale in return. On 10th April 1908 he executed the document put forward, having been led to believe it was in accordance with their agreement. He and his son remained in possession paying plaintiffs their interest. He also pleaded that his son was interested to the extent of a half-share and should be made a party.

Then plaintiff filed an amended plaint, adding the son San, E, as defendant and changing his prayer to one for possession and partition if defendant 2 be found to be entitled to any share.

Written statements were put in: defendant 1 pleaded as before but added that the land was worth Rs. 5,000; that he had paid plaintiff all the interest and some principal, in all Rs. 3,105; that defendant 2 was interested in a half-share and that the amended plaint should be rejected as setting up a claim of a substantiaily different character.

Defendant 2 pleaded that his father could alienate only one-half.

I should have pointed out that the amended plaint was filed in consequence of an order, dated 23rd Sepetmber 1911, in which the Subdivisional Judge held that he could not grant a perpetual injunction, but that instead of dismissing the suit straight off it would be better to direct plaintiff to amend and sue for possession.

On the amended pleadings a large number of issues were drawn. The first Court held by an order, dated 24th November 1911, that the suit should not be dismissed on the ground that the amendment made it one of a substantially different character. On the merits he found the deed of 19th April 1908 had been executed owing to misrepresentation by plaintiff and that plaintiff was really a mortgagee. He found Rs. 875 was still due and gave plaintiff a decree for that amount and that if it was paid by 12th May 1912, plaintiff should reconvey the land to defendants, failing which defendant should be barred from redeeming.

The learned Divisional Judge held that the evidence did not establish misrepresentation, that it was more probable that defendant knew what he was executing but thought, as plaintiff did, that nevertheless he could redeem, that they could not go behind the deed and show it was meant to be a mortgage and not a sale and that the sale was good to the extent of three-quarters.

The points that I have to decide are:

(1) Whether amendment should have been allowed?

(2) Was there misrepresentation?

(3) If not, was the sale good to the extent of half or three-quarters of the land?

Under our present Code of Civil Procedure amendment is a matter of discretion, and though as a general proposition it may be said that if the amendment results in changing the claim to one of a substantially different character, the Court would wisely exercise its dis-

cretion by not allowing it, I do not think it should ever be regarded as a hard and fast rule. It is true that in the present suit there is such a change, but it was carefully considered and the amendment was made under the orders of the Court. It was again considered and an appellate Court does not lightly interfere with a discretion carefully exercised where no injury has resulted. There has been no injury in the present case, and the result has been to bring the parties to issue on the real points of dispute and has permitted a final disposal of their differences. I see no reason for interfering now.

As to misrepresentation, it is to be noted that in the amended plaint the principal due to the Chetty is said to be Rs. 1,400, and Shwe Po says also in his evidence that plaintiff paid Rs. 2,000, but why does not appear, seeing he was to pay only the principal due. Kyauk Pa, plaintiff 2, paid the Chetty Rs. 2,000 and got back the mortgage. This was 15 days before the deed of sale was executed. Shwe Po says he was asked to sign the deed outside the Sub-Registrar's office. He asked Kyauk Pa if it was written in accordance with the original promise and if he would accept two and a half per cent. interest. He says he did not know that U Bein's (plaintiff 1) name was entered nor that there was no mention of interest until he was sued. He says he worked the land in 1270 and 1271 and paid Rs. 540 as interest for each year. In cross-examination he says Kyauk Pa only paid the Chetty Rs. 2,000, i. e., Rs. 1,400 principal and Rs. 600 interest, on condition he got the deed which was to provide that if he could not repay the land was to become Kyauk Pa's. Further that no time for payment was fixed and that so long as he paid the interest, the right to redeem remained. He denies that he read the deed or that he had it read to him by anyone. He admits that pyesas were issued in Kyauk Pa's name, but he kept quiet. He took no receipts for payments he made as he trusted Kyauk Pa.

The onus of proving misrepresentation lies heavily on defendant. I cannot overlook the very doubtful character of his evidence. He distinctly stated that the agreement between him and Kyauk Pa was that the latter was to pay the principal and defendant himself the interest. This he changes in his evidence. This may be, of course but due to his instructions having been mistaken, but if Kyauk Pa was to pay off the mortgage and merely take the Chetty's place, there was no question of a sale. Yet it is clear from defendant's own evidence that Kyauk Pa demanded a sale. He says in describing the conversaation that Kyauk Pa in answer to the suggestion that he should step into the Chetty's shoes said: "No; by a sale I mean a mortgage and sale, by which I mean that I could redeem my land at any time on payment of the principal and interest." The evidence is agreed that Kyauk Pa at once demanded a sale outright, but he forthwith gave way and agreed to defendant having a right to repurchase. I am astisfied that it was intended that the document should evidence a sale, though it is quite possible that defendant asked to be allowed to buy his land back, and this may have been granted. This however is a different thing to proving that the document was deliberately drawn up as a sale, when the agreement was that it was to effect a mortgage by conditional sale. It would, in accordance with the custom and practice, be drawn up as an out and out sale. Defendant can read and might have read it, had he chosen and if he did not, he took the risk. I am not satisfied that there was any misrepresentation and I agree with the learned Divisional Judge that it is quite likely that they may have thought a right of repurchase still remained. This being so, it is not open to defendant to go behind the deed and prove it was intended to be something other than it was. This is admitted.

There remains the question whether the sale is good in respect of half or three quarters of the land; it does not seem to have been questioned by either party that it cannot be good so far as San E's share of one fourth is concerned. He was the only son of Shwe Po's first marriage. It is not suggested that he agreed to the sale or that he knew anything about it, though it may be questioned whether he did not.

The learned Divisional Judge has merely referred to certain authorities quoted in a written argument filed before him and holds it is good to the extent of three-quarters. The property was the joint property of Shwe Po and his wife Ma

Tok. She died leaving one son, San E. Since the ruling in *Ma On* v. *Shwe O* (1) it appears to have always been held in Lower Burma that on the death of one party to a marriage, the survivor has an absolute power of disposal over half the joint property and has a life interest only in the other half, with a power of selling it to meet the necessities of the family subject to the eldest child's right to claim a quarter share : see *Ma Nyo* v. *Ma Yauk* (2) and *Ma Pe* v. *Ma Thin Yin* (3).

In Upper Burma however a different rule is held to be the law. It is there held that on the death of the husband his widow succeeds to the estate, with the exception of certain specified property and one-fourth of the estate which go to the eldest son and of certain specified property which goes to the eldest daughter, that with the exception of this portion the widow is at liberty to spend the whole of the estate if she chooses to, and not merely for necessities. Further, that the texts of the Dhammathats, on which the doctrine that the widow can only spend the estate for necessities is based, refer to the spending of the specified property set apart for the eldest daughter and not to the spending of the bulk of the estate. *Mi Saw Myin* v. *Mi Shwe Thin* (4). In the case it is pointed out that in *Ma On* v. *Shwe O* (1) the opinion of Mr. Jardine in *Nga Shwe Yo* v. *Mi San Bhu* (5) was followed, but the special Court overlooked the fact Mr. Jardine has resiled to a great extent from that opinion in *Maung Po Lat* v. *Mi Po Le* (6).

The authorities are quoted in Maung Tha Gywe's Treatise on Buddhist Law, Vol. 2, pp. 36 onwards, and I need not cite them all here. The question is one of great importance. The rulings in *Ma On* v. *Shwe O* (1) and *Nga Shwe Yo* v. *Mi San Bhu* (5) have always been followed without question since they were issued, except for the remarks in *Maung Po Lat* v. *Mi Po Le* (6) which have not so far as I can find been noticed. I therefore refer for a decision of a Bench the following questions:

In respect of property jointly owned by a Burmese Buddhist husband and wife on the death of the husband, has the widow an absolute disposing power over her half-share of the property only or over three-fourths of the whole property :(a) where there is only one child of the marriage living, and (b) where there are several children.

The former question only really arises in this case, but it will be necessary to consider the whole question in order to arrive at a decision. I refer the latter branch also subject to the decision of the Bench as to whether it can be referred.

(1) S. J. L. B. 378.
(2) [1907 08] 4 L. B. R. 256.
(3) [1907-08] 4 L. B. R. 287=14 Bur. L. R. 280.
(4) [1912] 15 I. C. 919.
(5) S. J. L. B. 108.
(6) S. J. L. B. 212.

Opinions

Twomey, J.—The question referred by Robinson, J, in this case is as follows :

"In respect of property jointly owned by a Burmese Buddhist husband and wife on the death of the husband, has the widow an absolute disposing power over her half-share of the property only or over three-fourths of the whole property: (a) where there is only one child of the marriage living, and (b) where there are several children?"

The land in suit was acquired by the defendant 1, Shwe Po, and his wife, Ma Tok as their joint property. They had issue, one son, defendant 2, San E. Ma Tok died about ten years before the suit was filed.

Subsequently, Shwe Po married a second wife, Ma Nyein U. There was no partition of the property with the son, San E. After the second marriage Shwe Po sold the land without the consent of San E.

It is clear that the question referred by the learned Judge does not arise, as this is not a case of a widow's estate at all. By consent, the reference has been amended as follows :

A, a Burmese Buddhist, and, his wife *B*, jointly acquire certain property. There is an issue of a marriage, one son, *C*. *B* dies. *A* marries again without partitioning the property with his son *C*. To what extent can *A* dispose absolutely of the property?

It is clear that as regards one half of the property at least, the widower has an absolute right of disposal. This is admittedly settled law both in Upper and Lower Burma.

The son could certainly have claimed a one-fourth share on his father's second marriage: see authorities cited in *Seik*

Maung Kaung v. *Maung Po Nyein* (7). He could apparently claim this share at any time within twelve years of the marriage (Art. 123, Sch. 1, Limitation Act) and this period had not expired at the time of the sale. From the time of the marriage he had an immediate right to get one-fourth of the undivided family property, and it seems reasonable to hold that the purchaser having bought the land within twelve years of the marriage took it subject to this right. The purchaser presumably knew or could easily have ascertained the fact that Shwe Po had a son by a former marriage who had not got yet his quarter-share. Moreover the respondent did not appeal against the Divisional Court's decree, which in effect disallowed the sale as regards the son's quarter-share.

The only question is whether it should be disallowed also as regards another quarter, i. e., the residue after deducting the son's quarter and the half-share over which the father admittedly had full disposing power.

It has been held in Upper Burma [see *Sa So* v. *Mi Han* (8) that when an only son who is also an only child has taken his one-fourth share as auratha, the widow has absolute disposing power over the remaining three-fourths of the estate. This is in conformity with the view taken in the Lower Burma case, *Mg Hmu* v. *Po Thin* (9), where it was held that the eldest son after taking his one fourth share has no right to a further partition nor any right in the remainder of the estate (except a right of pre-emption in case of sale by other coheirs.)

Does it make any difference that the son had not exercised his right before the land was sold? Is he nevertheless to be limited to the one-fourth share which he could have got by claiming partition before the sale? It is true that it was family property when the father sold it, but the whole title was in him subject only to the auratha's right. By not making an immediate claim to the one-fourth share the son might get a large share (by partition with his stepmother and stepbrothers, if any) when the estate fell in on his father's death. But in that case he would take the ordinary risk of an expectant heir and could only share in whatever residue happened to be left on his father's death.

Arguments have been addressed to us as to the application of the rule laid down by the special Court in *Ma On* v. *Shwe O* (1), that as regards one-half of the joint property of herself and her deceased husband a widow has only a life interest with a power of sale in case of necessity. It is faintly contended that the same rule should be applied by analogy to the case of a widower with an only son.

The sale in the present case is admittedly voidable as regards one-fourth, because it was sold burdened with the auratha's right. Is it also voidable as regards any remaining part of the three-fourths on the ground that the sale was not a sale for necessity? It is clearly not voidable as regards half out of three-fourths, for that half was admittedly the father's own to deal with as he pleased. As regards the remaining one-fourth, whatever might be the case, if there were more than one child of Maung Shwe Po's first marriage, there is, so far as I can find, no authority for holding that a father with a single son is under any such restriction. Assuming that the rule laid down in *Ma On* v. *Shwe O* (1) is well founded, I can see no reason for applying it in such a case as this. The only son is safeguarded as regards one-fourth of the estate and that is all that he could get in his father's lifetime. He can only so claim it within the period of limitation. There are no younger children whose interests have to be considered. If the rule laid down in *Ma On* v. *Shwe O* (1) has any reason to support it, it is only that this protection is desirable in the interests of the younger children who cannot claim partition till both parents are dead. But it would be unreasonable to extend it to the case of an only son who deliberately refrains from claiming his due share in his father's lifetime and takes his chance of obtaining a larger fractional share in the residue after his father's death.

The correctness of the rule laid down in *Ma On* v. *Shwe O* (1) has been seriously disputed in the arguments of counsel, and it has been brought to our notice that the Dhammathats on which the rule is based have lately been interpreted by the Judicial Commissioner, Upper Burma, in a different sense. But

(7) [1900-02] 1 L. B. R. 23
(8) [1892-96] 2 U. B. R. 171.
(9) [1900-02] 1 L. B. R 50.

holding that the rule in question has no application to the present reference, I think that we are not in a position now to deal with the conflict of authority or to reconsider the judgement of the special Court.

I would answer the (amended) reference by saying thnt the widower *A* in the circumstances stated can dispose absolutely of three-fourths of the property.

Fox, C. J.—I agree in Twomey, J.'s answer to the amended question consented to by the advocates.

I have nothing further to add.

Ten gold mohurs allowed as advocate's fee in the reference.

These costs will follow the result of the case.

Hartnoll, J.—The reference as made by Robinson, J. does not fit the facts of the present case and is in addition unnecessarily wide. It has therefore been amended as set out by Twomey, J., whose judgment I have had the privilege of reading.

At the hearing of the reference the main argument raised was that the decision in the case of *Ma On* v. *Shwe O* (1) was erroneous and that the decision in the case of *Mi Saw Myin* v. *Mi Shwe Thin* (4) should be followed. My learned colleague, Twomey, J., considers that in this reference the case of *Ma On* v. *Shwe O* (1) is not in point in that in the present case no younger children were left. When the first wife, Ma Tok, died only one son, San E, was left. I agree with this view. The case of *Maung Seik Kaung* v. *Maung Po Nyein* (7) decided that on the death of the mother, if the father marries again, the eldest son can claim a fourth share of the general joint estate of the parents, and with this decision I agree. In the present case therefore when Ma. Shwe Po married again, San E had the right to claim a fourth share in the joint property of his parents. He was not in the position of a younger child who cannot claim a share in the inheritance until the death of both parents. He had the right to claim this one-fourth share during the period allowed by the law of limitation, and if during such a period the respondents purchased the land from Mg. Shwe Po, they would taken it subject to San E's right to claim his share. No issue has been fixed and decided as to whether the respondents purchased during such period, though it seems probable that they did; but assuming that the purchase took place after such period of limitation, what is the position? As Mg. San E had allowed the period of limitation to pass, he could not claim his one-fourth share and so it became irrecoverable and lapsed in his father's estate. He could claim nothing further until his father died and then he would claim not as an heir entitled to inherit a portion of the estate consequent on his mother's death, but as an heir to his father's estate. In his case, claiming as an heir of his mother in his father's lifetime, there is no provision of Buddhist law to apply, such as was found to exist in the case of *Ma On* v. *Shwe O* (1) in favour of younger children, and so nothing to prevent his father disposing of his lapsed share in toto.

The Divisional Judge has held the sale to be good to the extent of three-quarters and in any case, in the view I take, it was good to such an extent.

I would answer the reference as amended by my learned colleague, Twomey, J., by saying:

"In any view of the circumstances the sale was good as regards three-quarters of the land; if the period of limitation had lapsed during which San E could claim his share, the sale would be good as regards the whole of the land."

The last part of the answer is not necessary, as respondents have not appealed against the dismissal of their claim to one fourth of the land.

K.N./R.K *Reference answered.*

A. I. R. 1914 Lower Burma 233

ROBINSON, J.

Mg. Yin Kye—Defendant—Appellant.

v.

Ma Sein—Plaintiff—Respondent.

Special Second Appeal No. 256 of 1912, Decided on 12th February 1914.

(a) Buddhist Law (Burmese)—Desertion for statutory periods does not dissolve marriage without volition of either party.

Desertion for the statutory periods does not of itself dissolve a marriage tie without any further and expressed act of volition on the part of either party to the marriage: 3 *L. B. R.* 175 (*F.B.*), *Rel. on.* [P 234 C 1]

(b) Husband and Wife—Divorce—Beating wife and charging with adultery is sufficient cruelty.

Beating one's wife and charging her falsely with adultery is sufficient cruelty. [P 234 C 2]

(c) Husband and Wife—Divorce.

Obiter—An innocent party can obtain a legal divorce by suit on the ground of desertion for the statutory period alone. [P 234 C 1]

Palit—for Appellant.

Halkar—for Respondent.

Judgment.—Plaintiff-respondent was married to defendant-appellant and lived with him for eight or nine years. She sues for divorce alleging she had to leave him owing to his cruelty and false charges of adultery. They lived apart for 18 months before she brought her suit. She bases her claim on two grounds: desertion and cruelty.

As to the former, desertion for the statutory periods does not of itself dissolve the marriage tie without any further and expresed act of volition on the part of either party to the marriage, but the Full Bench in *Thein Pe* v. *U Pet* (1) did not decide anything more than that. I need not consider the ruling any further, though I would probably hold, if it were necessary to decide the point, that the innocent party could obtain a legal divorce by suit on that ground alone. In the present case plaintiff declares she was frequently beaten with hands and fists; that the blows were severe enough to cause blood to flow on one occasion and that they raised marks. After she left defendant she was one day talking to the wife of a pleader when defendant came in and beat her very severely. She further alleges defendant charged her with adultery and actually filed a case on this ground against one Po Su which he lost.

There is a good deal of evidence as to the beatings and indeed some at any rate are admitted by defendant. He says they were not severe, were only by way of admonition. He says she took money from the schoolboys which they took from their parents and he beat her in consequence. He also admits charging her with adultery and says she once confessed her guilt and begged for forgiveness. He heard from others also of her bad conduct.

I see no reason to doubt the fact of his beating her. The evidence of it is in no way broken down and the only reply is to charge one of the witnesses with not being a suitable companion for his wife. His evidence does not weaken plaintiff's case but strengthens it. Plaintiff's witnesses do not, except in one instance, refer to any particular occasion but the evidence as a whole, coupled with the admitted fact of constantly charging her with adultery, is, I consider sufficient.

As to desertion, I consider that as defendant's conduct forced her to leave him he is the guilty party.

I dismiss the appeal. There will be a decree for divorce as prayed. It is not necessary to make any order as to the effect on any property there may be. Any claim to property can form the subject of a separate suit.

Appellant must pay re-pondent's costs. Advocate's fee two gold mohurs.

K.N./R.K. *Appeal dismissed.*

(1) [1905-1906] 3 L. B. R. 175. (F. B.)

A. I. R. 1914 Lower Burma 234

TWOMEY, J.

Emperor

v.

Kamali Khan—Opposite Party.

Criminal Appeals Nos. 321, 325, 326 and 327 of 1914, Decided on 30th June 1914, from order of Senior Magistrate, Insein, D/- 29th January 1914.

Hackney Carriage Act (14 of 1379), Ss. 6 and 7—Driver is not "keeper" within R. 15 of Insein Rules under the Act—When owner can be punished under R. 15 pointed out.

The driver of a hackney carriage who refuses to ply it for hire is not punishable for infringment of R. 15 of the Insein Rules under the Hackney Carriages Act, because he cannot properly be said to "keep" the carriage which he happens to be driving. And the "owner" or keeper of a carriage is not punishable for the refusal of his servant, i. e., the driver. It must be shown that the hirer applied to the "owner" or "keeper" and was refused by him. [P 235 C 1,2]

Judgment.—In these four appeals by the Local Government the accused persons are owners of hackney carriages at Insein. They were fined by the Honorary Magistrates' Bench for infringing R. 15 of the Insein Rules under the Hackney Carriages Act, 1879, which lays down that "the owner of or the person keeping a hackney carriage shall be bound to let such a carriage to any person requiring the same at any hour of the day or night." It was the drivers who refused to ply, but the Honorary Magistrates held the owners responsible and convicted them. The Senior Magistrate on appeal set aside the convictions and acquitted the accused persons holding that the "person keeping" in R. 15 includes the driver and that it was the

drivers and not the owners who should have been prosecuted. The Government in appeal from the acquittal contends that the Senior Magistrate's view is wrong and that the owners should be held liable for the acts of the drivers. The Bench of Magistrates at Insein is a Second Class Bench and had no power to try these cases at all: vide S. 261, Criminal P. C. On this ground alone the present appeals must fail. But if it appeared to this Court that the accused persons were liable to prosecution before a duly empowered tribunal it would be proper to order a fresh trial. I have therefore heard arguments as to the merits of the question raised in the Government appeals.

I think the lower appellate Court misconstrued R. 15 in holding that the drivers could be prosecuted under it. The words "person keeping" in the rule are taken from S. 6, Cl. H, of the Act. To "keep" a thing, as explained in Stround's Legal Dictionary, involves the idea of having over it the immediate control of a character more or less permanent. It would apply to any person to whom the owner makes over charge of the gharry stables. But a driver, according to the orders of his employer, may drive different gharries on different days, or one gharry in the morning and another in the evening. He cannot properly be said to "keep" the gharry which he happens to be driving. This view is supported by the definition of the word "proprietor" in the English statute, relating to hackney carriages in London, 6 and 7 Vic., Ch. 86, S. 2. It includes any person "keeping" a hackney carriage, but distinguishes a person "keeping" it from the driver. Moreover if it were intended that the driver should be punishable under R. 15, we should probably find the driver expressly mentioned in the rule, as he is made expressly responsible in several other rules (e. g., Rs. 18, 19, 30, etc.). But if the only persons who can be punished for breach of the rule are the owners or other persons holding control of the hackney carriage, it is clear that the accused persons in these cases could be convicted only on the assumption that they are liable as masters for the acts of their servants, the drivers.

Under several English statutes employers have been held punishable in respect of violations of the statutes by their servants, if the act done by the servant was within the scope of his authority as such. Most of these cases were under the Licensing Acts, the Merchandise Marks Acts, the Sale of Drugs Acts and the Weights and Measures Acts. The wrongful act of the servant under these statutes is usually held to be the wrongful act of the master. But I have been referred to no case in which a hackney carriage owner has been vicariously punished for breaches of the law by his drivers, and I note that under Statute 6 and 7 Vic. Ch. 86, such prosecutions as the present would not be possible in London, for it is not the owner but the driver who is made punishable by the Statute for "refusing to admit and carry at the lawful fare any passenger for whom there is room:" S. 33. It is argued, however that Hackney Carriages Act contemplates an owner acting through his drivers, that it is with the driver at a hackney carriage stand the hirer has usually to deal and not with the owner at the gharry stables and consequently that when the Hackney Carriages Act, S. 6, says the owner "or person keeping" the gharry shall be bound to let, the intention must be that the owner through his driver should be bound to do so.

I am not satisfied that this view of the Act and the rules is correct. Besides R. 15 there are several others clauses which seem to contemplate the hirer dealing with the owner direct (see S. 9 which provides for disputes between the hirer and the "owner or driver," R. 21. which speaks of special agreements between the owner and the hirer). It seems to me that before the owner is held liable under R. 15, it should be shown that the hirer applied to the owner or keeper and was refused by him. The rule and the clauses of the Act on which it is based lay the obligation distinctly on the owner or keeper and on no one else, and it seems reasonable that he should not be deemed to have disobeyed the law and incurred the penalty provided for this disobedience when he has not been given an opportunity of obeying. The case is not parallel to that of a servant selling liquor, drugs, etc., for his master, as in the English statutes referred to above, and in those statutes the duty or obligation is not

definitely laid on the master in contradistinction to the servant as in the present case. It may be said that according to the view which I take the rule will be to a great extent inoperative, for a man who is refused by a driver will not take the trouble to seek out the owner. That may be a good reason for amending the Act, but it is not a reason for unduly straining the law as it stands. I therefore dismiss the four appeals.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Lower Burma 236

HARTNOLL, OFFG. C. J. AND TWOMEY, J.

Hardandoss and *others*—Appellants.

v.

Rani Mohori Bibi and *others*—Respondents.

First Appeal No. 28 of 1910, Decided on 11th March 1914.

Contract Act (9 of 1872), S. 2—Quoting lowest price is not making offer—What is offer and acceptance explained.

In answer to a broker's telegram, "Have likely purchaser your three properties, telegraph lowest price for each," the defendant, the owner of the properties, telegraphed his lowest price for each property and added "reply by tomorrow." Upon receipt of this telegram the broker accepted earnest money for one of the properties and wired back to the defendant informing him accordingly and also asking him to "forward title-deeds." The defendant refused to sell only one of the three properties and at the same time repudiated the broker's acceptance of the earnest money as "without authority:"

Held : that (1) the mere statement of the lowest price at which the defendant was willing to sell contained no implied contract to sell at the price ; (2) the words "reply by tomorrow" meant that the defendant wished to to be informed whether the broker's purchaser was willing to buy and that if the reply was in the affirmative then the defendant would decide whether he would sell or not ; (3) as the defendant's telegram was not an offer, the broker's reply thereto could not be treated as an acceptance ; (4) even if the defendant's telegram were taken as an offer, it was an offer to sell the three properties collectively and not singly.

[P 237 C 1]

N. M. Cowasjee—for Appellant.

Ormiston—for Respondents 4 and 5.

Hartnoll, Offg. C. J.—The appellants sued the respondents to enforce specific performance of an agreement to sell 5th class lots Nos. 9 and 10 in Block D-1 in the town of Rangoon, together with the building thereon known as house No. 8 in 29th Street, for a sum of of Rs. 45,000. Their case is that Raja Shew Bux Bogla, now deceased, and whose representatives the first set of respondents are, agreed on 18th September 1907, through Messrs. Balthazar and Son, to sell to them the aforesaid properties. The second set of respondents are made parties to the suit as the appellants state that they are informed and verily believe that after the institution of the suit Raja Shew Bux Bogla on 21st August 1908 by a registered deed of sale purported to transfer the aforesaid properties to the second set of respondents for the consideration mentioned in the said sale deed. The appellants put the second set of respondents to strict proof of their alleged purchase and assert that prior to their purchase they had notice of the purchase of the properties by them. In the alternative the appellants also asked for damages to the extent of Rs. 15,000 by way of compensation if they were not given a decree for specific performance. This was against the first set of respondents. This alternative claim was abandoned on appeal.

There is no ground for doubting that the properties were sold to the second set of respondents for Rs. 1,21,000 on 22nd September 1907.

The first point for determination is whether there was an agreement to sell the properties to the appellants on 18th September 1907. The appellant Paladroy went to Messrs. Balthazar & Son and employed that firm to negotiate the sale for his firm. Shew Bux Bogla not only had the properties in dispute for sale but two others, one being in Pazundaung and the other in Ahlon.

The following telegrams then passed between Balthazar and the firm of Sheo Bux.

1. From Balthazar to Shew Bux dated 17th September 1907.

"Have likely purchaser your three properties, telegraph lowest price for each."

2. From Shew Bux to Balthazar dated 17th September 1907.

"Pazandaung, 55,000; Ahlon, 25,000, No. 9. 45,000. Reply by tomorrow."

3. From Balthazar to Shew Bux dated 18th September 1907.

"Sold house 29th Street your limit. Received earnest money 5,000, forward deeds."

4. From Shew Bux to Balthazar dated 18th September 1907.

"Cannot sell No. 9 alone. Can sell 3 properties together. See our agent."

5. From Balthazar to Shew Bux dated 19th September 1907.

"Agent has no instructions. Earnest money with us, forward orders."

6. From Shew Bux to Balthazar dated 20th September 1907.

"Received wire nineteenth. Strange you have accepted earnest money without authority. Can't confirm sale, letter follows."

The telegrams passed between Rangoon and Calcutta.

On the authority of the case of *Harvey* v. *Facey* (1) the learned Judge on the original side has held that these telegrams do not amount to an agreement to sell the house and land in 29th Street and it is urged that he is wrong. I am unable to see that he was,and the circumstances of the present case seem to be even stronger than the circumstances in the caae af *Harvey* v. *Facey* (1) for holding that there was no completed contract for sale. The first telegram does not ask specifically whether Shew Bux will sell. It merely says: "Have likely purchaser your three properties." It then goes on: "Telegraph lowest price for each". Shew Bux did so and then says: "Reply by tomorrow". It is urged that there is special virtue in the words: "Reply tomorrow," and that Shew Bux's telegram is a firm offer to sell limited to time. I am unable to see that it was such an offer. It was a reply to Balthazar's telegram asking for telegraphic information as to the lowest price for each property. The words "reply by tomorrow" clearly mean that Shew Bux wished to know by the morrow whether Balthazar's likely purchaser decided to buy. Then, if the reply was in the affirmative, it would be for Shew Bux to finally decide whether he would sell or not. In the words of their Lordships who decided the case of *Harvey* v. *Facey* (1) I cannot treat the telegram from Shew Bux giving the lowest price for each property as binding him in any respect except to the extent it does by its terms, viz., the lowest price. Everything else is left open and the reply telegram from Balthazar cannot be treated as an acceptance of an offer to sell to them. It is an offer that required to be accepted by Shew Bux. The mere statement of the lowest price at which the vender would sell contains no implied contract to sell at that price to the persons making the inquiry. Again, in the present case, when Balthazar telegraphed that he had sold the house in 29th Street and had received earnest money, Shew Bux promptly replied that he could not sell the house alone, but only the three properties together. Evidence is led to show why he desired to sell the three properties together, viz., that he was closing his business in Rangoon. It seems very likely that he had no intention of selling the properties singly. The first telegram says: "Have likely purchaser your 3 properties." Even supposing that Shew Bux's first telegram was an offer to sell (and I have already held that it was not) the further consideration would arise whether it was an offer to sell the properties collectively or singly. Having in view the words of the first telegram I would hold that the appellants have not proved it was an offer to sell only one of the properties, supposit was an offer at all.

It is urged that Shew Bux's telegram giving the lowest prices for each and asking for a reply constituted Balthazar his agent to sell, that Balthazar became the broker for both parties; but it was admitted that Shew Bux's telegram only constituted Balthazar his agent if it was an offer to sell. I have already held that it was not, and so the contention cannot prevail. The appeal must therefore in my opinion fail, and it is unnecessary to consider whether the second set of respondents had notice of the contents of the telegrams that passed between Balthazar and Shew Bux which I have set out.

I would dismiss the appeal with costs to the second set of respondents.

Twomey, J.—I concur.

K.N./R.K. *Appeal dismissed.*

(1) [1893] A. C. 552=62 L. J. P. C. 127=1 R. 428= 69 L. T. 504=42 W. R. 129.

A. I. R. 1914 Lower Burma 237

HARTNOLL, OFFG. C. J. AND TWOMEY, J.

W. A. Providence—Appellant.

v.

P. T. Christenson—Respondent.

First Appeal Nos. 53 and 58 of 191
Decided on 3rd March 1914.

(a) Tort—Libel—Absence of intention is no defence—If article libellous and is understood to refer to plaintiff it is sufficient.

In an action for libel it is no defence to show that the defendant did not intend to defame the plaintiff, if reasonable people would think the language to be defamatory of the plaintiff. The question for decision in such cases is, whether the article is libellous and whether it designates the plaintiff in such a way as to let those who know him understand that he is the person meant. [P 229 C 1]

(b) Tort — Defamation — Damages — Evidence of rumours is inadmissible in assessing damages.

Evidence giving the substance of rumours and suspicions is inadmissible in like cases and such rumours cannot be taken into account as evidence of a sullied reputation in assessing damages [P 239 C 2]

The existence of unproved rumours regarding the plaintiff is no reason for giving him slight damages. [P 239 C 2 ; P 240 C 1]

Higginbotham—for Appellant.

Giles—tor Respondent.

Hartnoll, Offg. C. J.—This appeal and Civil First Appeal No. 53 of 1912 have been heard together. They both arise out of a suit in which P. T. Christenson sued the Revd. Father Boulanger, W. A. Providence and T. Mellican for Rs. 10,000, for libel in respect of an article entitled "Public Opinion" that appeared in a newspaper called the Moulmein Advertiser on Wednesday the 28th June 1911. The Revd. Father Boulanger was sued as the executor of the will of Robert Benjamin, deceased, it being alleged that as such executor he at all times material to the suit owned a printing press and owned and published a newspaper circulating widely in Moulmein and elsewhere known as the "Moulmein Advertiser." The Revd. Father Boulanger admits this. Providence was sued as editor and Mellican, as printer and publisher of the said newspaper and they admit that they were respectively editor and printer and publisher. The learned District Judge found the libel on Christenson proved and has given him damages against all three defendants to the extent of Rs. 1,000 with costs of the suit in proportion. In consequence he has been ordered to pay to the defendants Rs. 411-8-0.

An appeal has now been laid by Providence asking for a reversal of the decree and by Christenson asking for enhanced damages. D. O'Sullivan has been made respondent 4 as administrator of the estate of Robert Benjamin. He has not appeared to defend the appeal.

Providence contends that there is no proof on the record that the article complained of applied to Christenson and that the libel when read as a whole could not apply to him. The article complained of reads as follows:

Public Opinion

"A pleasant appearance is not all that is requisite as a pass-port for honesty, for there have been instances of very presentable fellows getting into business and making themselves "Master" in their master's place who have been guilty of the vilest injustice before God and man." After such an introduction a correspondent asks: "Are these kind of men to lead public opinion?" Our correspondent does not particularize, that is to say, he does not mention in what matter opinion was given, whether in a municipal matter or ought else. He continues: "Ignorance and presumption they say, go hand in hand." It was no doubt, this which led the poet to say:

"Let such teach others who themselves excel.

And censure freely who have written well."

"The poet, of course meant writers, critics, men who are in a position to offer an opinion, not stray vagabonds and interlopers, without education who cause destruction to families. What would you say, Mr. Editor, of a man who drives his master mad, a madness which leads ultimately to his death? And yet such fellows exist and thrive and the world countenances them. Another type of scoundrel that flourishes is the fellow who sells 90 per cent. of water with a dash of something. He thinks himself honest and desires to be supported. Strangely enough money or presents of some kind find favour with even people who are believed to be able to advise on important matters." There is no ground to doubt the veracity of our correspondent not knowing who or what he refers to, but we are only surprised he did not quote from Hamlet and wind up as follows:

"The serpent that did sting thy father's life now wears his crown. With witchcraft of his wit, with traitorous gifts, (Oh wicked wit and gifts, that have the power so to seduce) won to his

S. N. DAR
Vakil High

shameful lust the will of my most semi-righteous queen; Oh Hmlet, what a falling off was there."

The defendants say that they did not intend to defame Christenson, but that is no defence to the action. As was laid down in the case of *F. Hulton & Co.* v. *Jones* (1) by the House of Lords, "in an action for libel it is no defence to show that the defendant did not intend to defame the plaintiff if reasonable people would think the language to be defamatory of the plaintiff." In that case the appellants, owners and publishers of a newspaper published in an article defamatory statements of a named person believed by the author of the article and the editor of the paper to be a fictitious personage with an unusual name. The name was that of the respondent who was unknown to the author and the editor. In the action for libel against the appellants it was admitted that neither the writer nor the editor nor the appellants intended to defame the respondent, but evidence was given by his friends that they thought the article referred to him. Nevertheless it was held that the plaintiff was entitled to maintain the action. The same principle must be applied to the present case. The question for decision is whether the article is libellous, and whether it designates Christenson in such a way as to let those who know him understand that he is the person meant. It is not necessary that all the world should understand the libel; it is sufficient if those who know him can make out that he is the person meant. Christenson called witnesses to prove that, when they read the article, they understood that it referred to him. They prove that Christenson was assistant to the late Mr. Mitchell, that this gentleman became insane and died leaving a widow, who subsequently married Christenson, and that Mr. Mitchell's business is now carried on, managed and controlled by Christenson under the name of Mitchell, Christenson & Co. Certain of the witnesses give evidence that since the publication of the article Christenson has been shunned. One of them Grey, said: "I had heard rumours before, which when I read this made me think it referred to the plaintiff." This evidence is objected to by both sides and Providence urges that the District Judge should not have given weight to the evidence of any of the witnesses. The District Judge found that the witnesses in attributing the article to refer to the plaintiff must have acted on extraneous knowledge, that they must have known that he was suspected of having caused his master's madness, of causing destruction to families or that there had been rumours about him of such charges against his conduct and character, and he remarks that the importance of this opinion lies in the fact that though it may be reprehensible to repeat an existing libel, a person whose character has already suffered in this way, even if undeservedly, is obviously not in the same position as a person whose character and reputation are unsmirched. Strong objection is taken to this part of the judgment by Christenson. As regards the evidence of the witnesses they may exaggerate as to the extent that Christenson has been shunned by others, but I can see no reason to doubt them when they say that when they read the article they understood it to refer to Christenson. They do not give their reasons. They may possibly have fixed the article as referring to Christenson from rumours concerning him. The witness Grey, refers to having heard rumours which led him to believe that the article referred to Christenson. Such a statement was in my opinion, admissible. One of the ways in which the witnesses could form an opinion that the article referred to Christenson was to use what they knew and had heard of his past history. It is not as if there had been an attempt on the part of defendants to produce evidence of rumours. In such a case, evidence of such might not have been admissible: see *Scott* v. *Sampson* (2), a case referred to in the argument; but no attempt was made to prove any such rumours.

At the same time this passage in Grey's evidence and the fact that the witnesses may have formed their opinion partly on rumours to the effect that Christenson had carried on an adulterous intercourse with his master's wife and had caused his madness and death, should not in my

(1) [1910] A. C. 20=79 L. J. K. B. 198=101 L. T. 831=54 S. J. 116=26 T. L. R. 128.

(2) [1882] 8 Q. B. D. 491=51 L. J. Q. B. 380=46 L. T. 412=30 W. R. 541=46 J. R. 408.

opinion be considered as a ground for giving slight damages. There is nothing to show that such has been the case nor is it pleaded that Christenson has been guilty of such conduct. On the other hand it is urged that the article cannot be held to apply to him which is a submission that he has not been so guilty. Stress was laid by learned counsel for Providence that Christenson did not go into the box and learned counsel analyzed the article to show that it could not refer to Christenson ; but after reading and studying it, as I have said, I am not prepared to discredit the witnesses, when they say that when they read it they understood it to refer to Christenson. I would especially refer to the words about very presentable fellows getting into business and making themselves master in their master's place, about the man who drives his master mad, a madness which leads ultimately to his death, and the quotation from Hamlet. Accepting therefore the evidence of the witnesses that they understood the article to refer to Christenson I am of opinion that he has established that he has been libelled and that he is entitled to damages from the defendant. The article is obviously grossly libellous of the man who has taken his master's place.

As regards damages I am of opinion that the order of the District Judge is unduly lenient. As the order stands Christenson is only to get a net sum of Rs. 588-8-0. Taking into account the fact that the witnesses may have exaggerated the extent to which he has been shunned, I am still of opinion that he is entitled to substantial damages for so gross a libel.

I would therefore, alter the decree and give Christenson a decree for Rs. 3,000 and costs on that amount in the District Court, and I would not give respondents their costs in that Court on the unallowed portion of the claim.

As regards these appeals the effect of the above proposed order is that No. 58 is dismissed. Each party will pay their own costs in it.

As regards No. 53, Christenson will be given costs on the Rs. 3,000 decreed.

Twomey, J.—In my opinion the witness Grey's evidence as to rumours should have been excluded altogether as irrelvant. The judgment of Cave, J., in *Scott* v. *Sampson* (2) explains clearly the principle on which evidence giving the substance of rumours and suspicions is held to be inadmissible in libel cases, and the principle applies even to evidence such as that given by the witness Grey who said: "I had heard rumours before which when I read this (article) made me think it referred to plaintiff." That is to say, the witness had heard much the same story about the plaintiff before. If there really were such rumours and they had in fact affected the plaintiff's reputation the defendants could have proved by general evidence that the plaintiff had a damaged reputation. But no attempt whatever was made to prove this. The danger of admitting evidence of rumours is well exemplified in the present case, for it is evident that the District Judge in assessing damages took these rumours into account as if they were evidence of a sullied reputation. This course was, in my opinion, altogether without justification.

If the covert language of the article could not be shown to apply to the plaintiff I think that there would be no libel at all. But the application of the article to the plaintiff is indicated by a combination of facts, namely, that the plaintiff's master died insane and that the plaintiff has taken his master's place and married his master's widow. It would be surprising if such an unusual combination of facts were true of more than one individual in a comparatively small community like that of Moulmein. And the evidence shows that the plaintiff's acquaintances knowing these facts about the plaintiff's life at once perceived that the article must be aimed at him. No knowledge was necessary of rumours about the plaintiff's relations with his employer and his employer's wife.

It has been urged that the article deals primarily with men who lead public opinion and the plaintiff is not shown to be such a man. But it is not necessary that the whole of the article should be applicable to the plaintiff if there is enough in it for those who know him to see that he is meant.

I agree with my learned colleague that the amount of damages awarded is insufficient and that the amount should be

increased to Rs. 3,000. I also concur in the proposed order as to costs.

K.N./R.K. *Decree altered.*

A.I. R. 1914 Lower Burma 241

ORMOND AND TWOMEY, JJ.

Secy. of State—Appellant.

v.

Ma Dwe and *another*—Respondents.

First Appeal No. 155 of 1912, Decided on 4th June 1914.

(a) Landlord and Tenant—Covenant for renewal is not included in stipulation for renewal "on same covenants"—Covenant for purpetual renewal must be strictly proved.

When a covenant for renewal is expressed in a lease in the usual terms, i. e., an undertaking by the lessor to grant at its expiration a new lease to contain the same covenants such covenants will not include the covenant for renewal itself.

One who claims the right of perpetual renewal of a lease must strictly prove it [P 243 C 1]

(b) Limitation Act (1908)—Standing tree would be deemed to be immovable property.

Standing trees are immovable property for the purpose of the Limitation Act. [P 243 C 1]

(c) Limitation Act (9 of 1908), Arts. 113, 131 and 144—Art. 144 applies to claims on title and not on contract—Agreement for renewal of lease is not interest in immovable property and suit for specific performance is governed by Art. 113 and not Art. 144.

For Art. 144, Lim. Act, to apply the claim must be based on title and not on contract only.

An agreement to grant or renew a lease is not an interest in immovable property and a suit for the specific performance of such an agreement, not being a suit for the recovery of such property or any interests in it, is governed by Art. 113 and not by Art. 144, or Art. 131 Lim. Act. [P 243 C 2]

Rutledge—for Appellant.

Coltman—for Respondents.

Judgment. — The respondents, Ma Dwe and Ma Ya Byu, have jointly obtained letters of administration to the estate of Maung Si who was a Government permit-holder in the Attaran forests of the Amherst District. Their claim is based on Exs. B, C, D and E which were admitted in evidence by the District Court. Ex. B is a permit entitling Maung Si to extract teak timber from a certain forest called the Pobya Forest or "No. 10 in Hobday's map." The permit holder was to pay duty at specified rates per log at the revenue station. The permit was for 30 years expiring on 1st October 1896.

There is no reason to question the genuineness of Exs. C and D which explain the circumstances in which the permit Ex. B was issued. It appears that Maung Si or his father Maung Mu belonged to a body of persons who previously worked timber in the Attaran forests and that in consideration of their claims as such, the Government gave each of them the option of buying outright at Rs. 2-8-0 an acre the whole forest tract in which he had been working, or else of taking out a new permit for 30 years in the form of Ex. B. The orders in Ex. D contained the following passage with reference to those who took the new permits: "and it being the object of Government to perpetuate the growth of teak which shall be the property of the lethmat holders, the lethmat will be renewed at the end of the term for which they are granted on condition that plantations are made as per notification to be shortly issued." These orders were apparently communicated to Maung Si by the letter, Ex. C, of 30th August 1866 and as he elected to take out a permit, Ex. B was issued to him on 1st October 1866. No notification was issued as to the conditions on which plantations were to be made. Maung Si died before the expiry of the 30 years period for which the permit of 1866 was granted. In 1896, shortly before the expiry of the term, his son Maung Yan applied to the forest authorities for renewal of the permit.

The application was refused by the forest authorities, Ex. E, no reason for the refusal being assigned. In May 1901 a large part, the exact portion has not been ascertained of the forest covered by Maung Si's permit was included in the area declared under S. 18, Burma Forest Act, 1881, as constituting the Kyungawon Forest Reserve. In the forest settlement inquiry, which preceded the declaration no claim was preferred by Maung Yan or by any other of Maung Si's representatives and the settlement proceedings contain no reference to the rights of any of these persons.

The present suit against His Majesty's Secretary of State for India in Council was filed on 20th September 1907 by some of the representatives of Maung Si. They asked:

(1) That they might be declared "entitled to claim the right of renewing the late U Si's lethmat every 30 years," and

(2) that the defendant might be compelled to issue a lethmat to them in pursuance of the aforesaid right.

It was held by this Court in a former appeal in this case, on the assumption that the proper period of limitation in the case is 12 years from 1896, that the three original plaintiffs were not barred when they filed the suit, but that they had not in fact the necessary legal status as legal representatives of U Si. Time was given them to obtain letters of Administration and it was ordered that on their doing so the suit should proceed on the merits. It appears that the two plaintiffs-respondents then obtained letters of administration. The suit prceeded and has been decided entirely in favour of the plaintiffs-respondents.

We have not heard counsel on the question whether it is lawful to deem the suit by the administrators to have been filed by them on the date when the suit was originally filed by Ma Dwe and Ma Ya Byu (with Maung Nge since deceased) who on that date were not yet technically qualified by means of letters of administration to represent the estate of Maung Si. The letters of administration were not obtained till 1912 and if limitation continued to run up to that year, the suit would be barred even if it is held that the proper period of limitation for the suit was so much as 12 years from 1896. But we find that the appeal can be determined on grounds which render it unnecessary to deal with this question (it is actually raised in para. 2 of the memorandum of appeal).

We think it is clear that the documents Exs. B, C and D must be read together, and reading them in this way we are satisfied that the Conservator of Forests was bound to renew the permit in 1896. There is no force in the argument that the promise of renewal was conditional on the issue of the notification as to plantations foreshadowed in Ex. D. If such a notification had been issued and if Maung Si failed to comply with its conditions there would, no doubt, be good ground for refusing the renewal at the end of the 30 years term. But no conditions of any kind having been laid down the promise of renewal must be regarded as unqualified and binding on the Forest Department. If the permit-holder had during the period of 30 years committed a breach of rules such as the permit provides for (by confiscation and ejectment) that would probably be a valid reason for refusing to renew the permit. But short of this it seems to us that the permit-holder had a good right to renewal at the end of the 30 years period.

The plaintiffs-respondents however claim that under Ex. D they were entitled not merely to a renewal at the end of the 30 year's period, but to further renewals at intervals of 30 years in perpetuity. They rely chiefly on the passage in Ex. D declaring that it is "the object of Government to perpetuate the growth of teak which shall be the property of the lethmat-holders," followed by the reference to plantations which are to be made according to the notification (that was to, but in fact never did, issue). It is urged that as the teak trees planted by the permit-holders are said to be their own property and it takes much longer than 30 or even 60 years for a teak tree to reach the proper size for extraction, the parties cannot have intended that there should be only one renewal for 30 years. It is not disputed that teak trees wherever growing are the property of Government, nor is it urged that the Government in 1866 intended to make any new departure in this respect. In our opinion the teak which was to be "the property of the lethmat-holders" according to Ex. D was mature teak felled and taken to a revenue station during the currency of the permit, and that only when duty was paid on it. We cannot interpret the words as implying that the lethmat-holders were to be the owners of teak standing in the forest or were to be given any special interest in the individual trees that they planted. Ex. D appears to us to mean that in order to ensure a perpetual supply of mature teak the timber of which after extraction and after payment of duty at the revenue station shall belong to the extracting permit-holders, it is proposed to issue regulations for the planting of teak to replace mature teak so extracted, and as a special inducement to the permit holders to plant young teak to replace the mature teak they extract the Government promises to renew the permits at the end of the period of 30 years if the permit-holders carry out regulations for replanting to be shortly issued. There

is a clear undertaking for renewal. But we cannot find in Ex. D any undertaking express or implied, to grant further renewals at periodic intervals, and there is no extrinsic evidence to show an intention to grant such further renewals.

It is now established that when a covenant for renewal is expressed in a lease in the usual terms, i. e., an undertaking by the lessor to grant at its expiration a new lease to contain the same covenants, such covenants will not include the covenant for renewal itself. The burden of strict proof is imposed on anyone claiming the right of perpetual renewal and it is not to be inferred from any equivocal expressions which are fairly capable of being otherwise interpreted.*

The necessity for strict proof is all the greater when the promise of renewal is contained not in the dispositive document itself (Ex. B), but in a collateral document drawn in loose and informal terms. We are therefore constrained to hold that Ex. D embodies no undertaking to grant more than one renewal and the attempt of the plaintiffs-respondents to save limitation by bringing their case under Art. 131, of the schedule of the Limitation Act must fail.

The learned counsel for plaintiffs-respondents contends that if Art. 131 does not apply, then the appropriate article is 144, the suit being one for possession of an interest in immovable property, namely, the right to fell teak and extract the timber. Standing trees are immovable property for the purposes of the Limitation Act. But the plaintiff does not ask for possession of an interest in immovable property : he asks for specific performance of a promise to grant him such an interest. He does not claim to be in any way the owner of such an interest; and therefore he has no title under which he can claim possession. For Art. 144 to apply, the claim must be based on title and not on contract only. Maung Si was merely the promisee of a right in immovable property. Art 144, therefore does not apply to the case. We would refer to the case of *Lalla Ram Sohay Lall* v. *Bibee Chowbain* (1), in which the Calcutta High Court held that an agreement to grant a lease is not an interest in immovable property and that a suit upon such an agreement is not a suit for the recovery of such property or of an interest in it. We are asked here to enforce an agreement to grant a permit for the extraction of teak timber. The plaintiffs ask for a possession of the interest in the teak trees as the consequence of the permit being granted. Following the Calcutta case cited above we hold that the suit is really brought to enforce the agreement in Ex. D and that it is governed by Art. 113 and not by Art. 144.

It follows that the cause of action having arisen in 1896 when the renewal of the permit was refused, the suit was barred by limitation when it was filed in 1907. It becomes unneceesary therefore to deal with the further plea in defence that the rights of the plaintiffs, if any, over the whole or a part of the area covered by the permit of 1866 were extinguished in the year 1901 by the operation of S. 19, Burma Forests Act, 1881. The appeal is allowed. The decree of the District Court is set aside and the plaintiffs-respondents' suit is dismissed with costs. It is further ordered that the plaintiffs-respondents shall pay the court-fees which whuld have been payable by them if they had not been permitted to sue as paupers. A copy of the decree will be sent forthwith to the Collector, Amherst District.

K.N./R.K. *Appeal allowed.*

*See English cases cited in Foa on the Law of Landlord and Tenant, 4th Edn. pp. 308 and 309.

(1) [1874] 22 W. R. 287.

A. I. R. 1914 Lower Burma 243

ROBINSON, J.

Maung Shwe Min and *another*—Defendants—Appellants.

v.

Maung San Nyun—Plaintiff — Respondent.

Special Second Appeal No. 237 of 1912, Decided on 3rd February 1914.

Evidence Act, S. 102—Simple mortgage—Subsequent usufructuary mortgage to former's brother — Sale by latter to his brother—No mutation of names obtained—Onus of proof of sale lies heavily on usufructuary mortgagee.

The plaintiff mortgaged his land to defendant 1 by way of simple mortgage, and when the latter pressed for payment, he mortgaged the same land to the latter's brother, defendant 2 by usufructuary mortgage who again sold it to his brother defendant 3. The plaintiff consistently opposed any transfer of names in the revenue register and defendant 2 did not apply for the mutation till about two years

after the transaction, the onus lies in the first instance on the defendants to prove sale: 2 *I. C.* 535, *Foll.* [P 244 C 1]

Ba Dun —for Appellants.

N. C. Sen—for Respondent.

Judgment.—This is the usual dispute as to whether a certain transaction was a mortgage or a sale.

Plaintiff alleges and it is admitted that he mortgaged the land to defendant 1 for Rs. 40, interest at 12 per cent per annum. It is also admitted that he paid the first year's interest but not that for the second year. It is alleged that he then gave defendant 1 possession in lieu of interest and that the principal was to be called Rs. 50. Defendant 1 wanted his money and not possession and with his consent, and in his house and presence plaintiff transferred the land to defendant 2, the brother of defendant 1, for Rs. 50, and he was given possession. Some years later defendant 2 sold the land to defendant 3, who is also his brother, for Rs. 90.

It is clear from the evidence that plaintiff always opposed any transfer of names in the revenue registers and no change was made. It is significant that defendant 2 did not apply for mutation of names till December 1911, about two years after the transaction.

The first transaction was a mortgage and then a usufructuary mortgage. When the mortgagee pressed for his money his brother advances it and takes his place. On the principle laid down in *Ma Dun* v. *Lu O* (1) and the cases therein cited I must hold the onus lies in the first instance on the defendants-appellants. They have not discharged it. It is true that plaintiffs have not given much proof either, but the fact that no mutation was asked for and that the money was at once handed over to defendant 1 and that the transaction was in his house shows that it was intended merely to replace defendant 1 by defendant 2. They are brothers and I consider that on the facts and circumstances of the case the decision of the District Judge was right.

I dismiss the appeal with costs.

K.N./R.K. *Appeal dismissed.*

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(1) [1909] 5 L. B. R. 40=2 I. C. 535.

A. I. R. 1914 Lower Burma 244

HARTNOLL, OFFG. C. J. AND TWOMEY, J.

Kya Nyun—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 883 of 1913, Decided on 8th December 1913.

Criminal P. C. (5 of 1898), Ss. 303 and 307—Majority verdict unambiguous—Questions cannot be asked—Court must proceed under S. 307.

When a jury has returned a clear and unambiguous, though not unanimous, verdict, the Sessions Judge has no power to put questions to the jury under S. 303. If he disagrees with the verdict of the majority, he should proceed under S. 307. [P 245 C 1]

May Oung—for Appellant.

Hartnoll, Offg. C.J.—The appellant, Maung Kya Nyun, has been tried for murder, punishable under S. 302, I.P.C., by the Sessions Judge, Tenasserim Division, and a jury. He was charged with the murder of one Ma Shan Ma by stabbing her with a dagger.

In charging the jury the learned Sessions Judge in explaining the law said: "If you find that accused stabbed Ma Shan Ma then you must also find with what intention he did so.

"(1) Did he stab with the intention of causing death? If so, then your verdict should be murder under S. 302, I. P. C.

"(2) Did he stab with the intention of causing bodily injury sufficient in the ordinary course of nature to cause death? If so, then your verdict should be murder under S. 302, I.P.C.

"(3) Did he stab with the intention of causing such bodily injury as was likely to cause death? If so, then your verdict should be culpable homicide not amounting to murder punishable under the first part of S. 304, I. P. C.

"(4) Is he guilty of voluntarily causing grievous hurt by means of a dangerous weapon? If so, then your verdict should find under S. 326, I. P. C."

At the end of the charge the Sessions Judge said practically the same again. The jury then returned a verdict by a majority of 3 to 2 of culpable homicide not amounting to murder under the first part of S. 304, I.P.C. Taken in conjunction with the charge this is a clear and unambiguous verdict.

The Sessions Judge was not satisfied with it and put to the jury the following question:

" Do you not consider that accused stabbed with the intention of causing death or of causing bodily injury, and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death ? If you do, then you would be justified in bringing in a verdict of murder under S. 302, I. P. C."

The jury retired again and then returned with the answer that they were unanimously of opinion that accused intended to cause bodily injury sufficient in the ordinary course of nature to cause death. The Judge then said : "Then, do you consider the accused guilty of murder ?" The answer was " Yes." On this the Judge found appellant guilty of murder under S. 302, I. P. C., and sentenced him to be hanged.

It was urged on appeal that the jury having returned a clear and unambiguous verdict the Sessions Judge erred in putting questions under S. 303, Criminal P. C., and erred in not holding that the verdict under S. 304, I. P. C., was right as a matter of law. The Sessions Judge may have thought that, as the first verdict of the jury was not unanimous, he had the power under S. 302, Criminal P. C., to require them to retire for further consideration. In my opinion that section gives the Sessions Judge no such power after the verdict has been actually delivered. He could have asked them to retire for further consideration when he ascertained that they were not unanimous and before the delivery of their verdict, but could not do so after the actual delivery of the verdict. If he disagreed with the verdict of the majority, he should have proceeded under S. 307, Criminal P. C. This is the view taken in the case of *Hurry Churn Chuckerbutty* v. *Empress* (1), but I would not go so far as to say that a Sessions Judge cannot act under S. 302, Criminal P. C., when he has merely asked the jury the exact majority and has not actually taken the verdict.

The question remains as to what orders should now be passed. This is the second trial of appellant and a third trial is inadvisable. The first verdict of the jury was clear and unambiguous. I would accept it.

I would alter the conviction to one under the first part of S. 304, I. P. C., and the sentence to one of transportation for life.

Twomey, J.—I agree in holding that the action of the learned Sessions Judge was not warranted by law. On receiving the plain verdict of guilty under the first part of S. 304, I. P. C., the Judge's only lawful course, if he disagreed with the majority, was to submit the case with the grounds of his opinion to this Court under S. 307. He had no authority in the circumstances to put questions to the jury or to send them back for further deliberation. This view is in accordance with those expressed by the Bench in the Calcutta case to which my learned colleague refers. But I note that the judgment in that case does not go the length of saying that a Sessions Judge may not act under S. 302, Criminal P. C., when he has merely ascertained from the jury in what proportion they are divided. It is only when the nature of the actual finding has been disclosed that the Court is debarred from sending the jury back.

The charge of murder appears to me to have been fully established by the prosecution in this case, and the result must therefore be regarded as a miscarriage of justice. At the same time, and although we have the power to order a fresh trial, I think it would be inexpedient to do so, seeing that the appellant has been already tried twice.

I therefore concur in altering the conviction to one of culpable homicide not amounting to murder under the first part of S. 304, I.P.C., and the sentence to one of transportation for life.

K.N./R.K. *Conviction altered.*

(1) [1884] 10 Cal. 140=13 C. L. R. 358.

A. I. R. 1914 Lower Burma 245

HARTNOLL, OFFG. C. J. AND ORMOND, J.

In re *Catherine Thaddeus.*

Civil Reference No. 51 of 1914, Decided on 18th June 1914.

(a) Court-fees Act (7 of 1870), Art. 11—Word " value " means net value.

The word " value " in Art. 11, Sch. 1 means the net value and therefore only the net value of an estate should be taxed at the rate payable on such net value. [P 246 C 2]

(b) Interpretation of Statutes—Meaning not clear—Interpretation should be in favour of subject.

Where the meaning of the legislature is not clear the doubt must be given in favour of the subject : *A. I. R.* 1914 *Cal.* 40, *Foll.* [P 246 C 2]

D. Dorabjee—for Appellant.

Eggar, A. G. A.—for Government.

Order of Reference

This is an application for probate and the question arises as to the amount of court-fees to be paid. It has been hitherto the practice of this Court to assess the duty on the net value of the estate at the rate applicable to the gross value of the estate, The same practice appears to have been followed in Calcutta, but the question as to its propriety was recently raised there in the case *In the goods of Harriett Teviot Kerr* (1), and referred by the Chief Justice for decision to Mookerjee, J., who after full argument decided that the duty should be calculated at the rate applicable to the net value. As this decision raises some doubt in my mind as to the correctness of this Court's practice, I refer the question, as to whether the rate should be calcuated on the gross or net value, to be decided by a Full Bench or Bench of this Court as the Chief Judge may determine.

Judgment

Hartnoll, Offg. C. J.—The question for decision is as to the amount of duty to be paid on probate of the will of Gregcry Catchick Thaddeus deceased. It has hitherto been the practice of this Court to assess the duty on the net value of the estate at the rate applicable to the gross value of the estate, but in view of the decision in the case of *In the goods of Harriett Teviot Kerr* (1) the learned Judge on the original side has referred the question to a Bench. S. 19-I, Court-fees Act enacts as follows : (1) No order entitling the petitioner to the grant of probate or letters of administration shall be made upon an application for such grant until the petitioner has filed in the Court a valuation of the property in the form set forth in Sch. 3, and the Court is satisfied that the fee mentioned in No. 11, Sch. 1, has been paid on such valuation." This section was enacted by Act 11 of 1899. Sch. 3 is a form of valuation. Annexure A of it deals with all the property of the deceased and its value, Annexure B deals with the amount of debts, funeral expenses, mortgage encumbrances, property held in trust not beneficially or with general power to confer a beneficial interest, and other property not subject to duty. The total shown by Annexure B, which is stated as not subject to duty is then deducted from the total shown in Annexure A and is described as the net total. It is clear therefore that the duty is leviable on this net total. Art. 11, Sch. 1, lays down a sliding scale and begins : " When the amount or value of the property in respect of which the grant of probate or letters is made exceeds Rs. 1,000 but does not exceed Rs. 10,000 : 2 per centum on such amount or value, "and proceeds :

" When such amount or value exceeds Rs. 10,000 but does not exceed Rupees 50,000 : 2 1/2 per centum on such amount or value ; when such amount or value exceeds Rs. 50,000 : 3 per centum on such amount or value." The entries in Cols. 2 and 3 of the article were enacted by Act 7 of 1910. The difficulty arises in construing the words " amount or value of the property in respect of which the grant of probate or letters is made, " as probate or letters are granted on the gross value of the estate ; but according to S. 19-I the fees is only to be paid on the net value. Art. 11 makes the duty payable on the gross value ; but S. 19-I says that it is only to be paid on the net value. The meaning of the legislature seems to me to be not clear, and where this is so the doubt must, in my opinion, be given in favour of the subject. For the reasons given Mookerjee, J., in the case above quoted I am inclined to think that the intention was for the scale laid down in Art. 11 to be calculated on the net value shown in Sch. 3. The provisions of S. 19-B, Court-fees Act, seem to me to lend support to such a view. I would therefore hold that the rate should be calculated on the net value of the estate according to the scale laid down in Art. 11, Sch. 1. In the present case the net value is said to be Rs. 6,232-9-7. Duty should therefore be paid on this amount at the rate of 2 per cent.

Ormond, J.—I concur. Sch. 3, Court-fees Act shows that the value of an estate is the net value for the purposes of taxation. I think that the words in Col. 2. Sch. 1, Art. 11, " value of the the property in respect of which the grant of probate or letters is made, "—are also intended to mean the nett value of the estate or, in other words, the actual or market value as a whole of the estate which is to be administered, which would be the value of the assets less the amount of liabilities.

(1) A. I. R. 1914 Cal. 40=21 I. C. 502.

Only the net value is taxed: and presumably all estates of the same net value are intended to pay the same tax. But if the above worde in Art. 11 are taken to mean the gross value i. e., the value of all the property that will come into the hands of the executor or administrator without taking into consideration the amount that must be paid out to creditors, an estate of the gross value of Rs. 51,000 but with liabilites to the extent of Rs. 42,000 and therefore of the net value of Rs. 9,000 would pay tax of 3 per cent. on Rs. 9000 i. e., Rs. 270 whereas estate of the value of Rs. 9,000 without liabilities would pay only 2 per cent i. e., Rs. 180.

K.N./R.K. *Reference answered.*

A. I. R. 1914 Lower Burma 247

HARTNOLL AND ORMOND, JJ.

In re *Chin Ah Yaing* and *another*—Appellant.

Civil Ref. No. 6 of 1914, Decided on 18th June 1914.

(a) Court-fees Act (7 of 1870), S. 19 (8) and Art. 11—"Amount or value" in Art. 11 refers to net value—Net value not exceeding Rs. 1,000—No fees are payable on probate.

The words "the amount or value of the property" in Art. 11, refer only to the net value. Therefore where the net value of a property in respect of which probate or letters are granted does not exceed Rs. 1,000, the probate or letters are not chargeable with any fees: *A. I. R.* 1914 *Cal.* 40 and *A. I. R.* 1914 *L. B.* 245, *Foll.*

[P 248 C 1]

(b) Interpretation of Statute—Meaning not clear—Benefit of doubt must be given to subject.

Where the meaning of the legislature is not clear the doubt must be given in favour of the subject.

[P 248 C 1]

Harvey—for Appellant.

Eggar—for Government.

Order of Reference

This is an application for Probate in respect of an estate of which the gross value is Rs. 16,000 and the net value is Rs. 540 and the question is whether any and, if so, what duty is payable. Sch. 1, Art. 11, Court-fees Act, provides that if the amount or value of the property in respect of which the grant of probate or letters is issued exceeds Rs. 1,000, but does not exceed Rs. 10,000, the proper fee shall be 2 per cent on such amount or value; and 2½ per cent if it is over Rs. 10,000, and so forth on a sliding scale.

Section 19 (viii) provides that no duty is payable where the amount or value of the property in respect of which the probate or letters shall be granted does not exceed Rs. 1,000. Heretofore the practice of this Court has been to construe the words "the amount or value of the estate," in Art. 11, as meaning what has been called the gross value of the estate, and therefore to calculate the rate of duty on such "gross value," but only to make it payable on such part of the property as was liable to duty. The Calcutta High Court, following certain decisions of the Allahabad and Bombay Courts, in the recent case of *In re Harriett Teviot Kerr* (1) now proposes to construe value in Art. 11 as meaning nett value. If this construction is adopted, and the term "gross value" seems somewhat artificial in itself and also to make the word "amount" tautologous, the value of an estate will be diminished by the debts payable out of it, and in the present case the value of the estate, instead of being Rs. 16,000, will be Rs. 540 and consequently exempt from duty under S. 19 (viii). The practice both of this Court and the Calcutta Court has hitherto been otherwise: *Collector of Maldah* v. *Nirode Kamini Debya* (2).

The learned Judge who decided the case of *In re Harriett Teviot Kerr* (1), which was specially referred under S. 5 and fully argued, stated that though the point decided in the *Collector of Maldah* v. *Nirode Kamini Debya* (2) did not arise in that case, it might, when it arises again, require re-examination and further consideration. The same remarks seem to me applicable to our own practice and to this case in which the point is directly raised, and I would therefore refer for the opinion of a Bench or Full Bench of this Court, as the Chief Judge may direct, the question whether when by reason of its debts the value of an estate does not exceed Rs. 1,000 any court-fee is payable before probate or letters can issue.

Judgment

Hartnoll, J.—The question for decision in this case is what, if any, duty is leviable under Art. 11, Sch. 1, Court-fees

(1) A. I. R. 1914 Cal. 40=21 I. C. 502.
(2) [1912] 15 I. C. 621.

Act, on an estate the gross value of which is Rs. 16,000 and the net value is Rs. 540. The meaning and effect of Art. 11 and S. 19 (i), Court-fees Act, has just been considered by me in *In re Catherine Thaddeus* (3). The present case in addition involves the consideration of the meaning of S. 19 (viii) of the same Act which is : "Nothing contained in this Act shall render the following documents chargeable with any fee : (viii) probate of a will, letters of administration . . . . . where the amount or value of the property in respect of which the probate or letters . . . . . shall be granted does not exceed one thousand rupees." Probate or letters are granted on the whole of the estate and so the amount or value on which they are granted would be the gross value of the estate. If therefore the gross value of the estate exceeds Rs. 1,000, it may be argued that there is no freedom from liability to duty by virtue of S. 19 (viii). But, as pointed out in the former reference, it may be that the intention was that the scale laid down in Art. 11 should be calculated on the net value shown in Sch. 3, or, in other words, that the words "the amount or value of the property in respect of which the grant of probate or letters is made" in Art. 11 should refer to the net value. If they are given that meaning in Art. 11, it would seem to be consistent to give them the same meaning in S. 19 (viii).

The matter seems to me to be again doubtful and I would give the doubt in favour of the subject. Where therefore the net value of a property in respect of which probate or letters are granted does not exceed Rs. 1,000, I would hold that the probate or letters are not chargeable with any fees. In the present case therefore I would hold that no fee is chargeable.

Ormond, J.—Exactly the same arguments apply in this case as in *In re Catherine Thaddeus* (3). Having held in that case that the words in Art. 11, Sch. 1, Court-fees Act, "Value of the property in respect of which the grant of probate or letters is made," mean the net value of the estate, the same construction must be placed upon those words in S. 19 (viii) of the same Act. In my opinion therefore S. 19 (viii) states that the probate of a will or letters are not chargeable with any fee under the Court-fees Act where the value of the assets less the amount of liabilities is Rs. 1,000 or less.

Moreover there is no provision under the Court-fees Act which renders such probate or letters chargeable with any fee : for under our decision in *In re, Catherine Thaddeus* (3), Art. 11 would not apply in a case where the value of the assets less the amount of liabilities is Rs. 1,000 or less.

K.N./R.K. *Reference answered.*

(3) A. I. R. 1914 L. B. 245=24 I. C. 793.

A. I. R. 1914 Lower Burma 248

HARTNOLL AND TWOMEY, JJ.

The Bank of Rangoon, Ltd.—Plaintiff—Appellant.

v.

Somasundarm Chetty and *others*—Defendants—Respondents.

First Appeal No. 90 of 1911, Decided on 30th July 1914.

(a) Power-of-attorney—If authority under is questioned it must be shown that it arises out of the power only—Construction must be strict (Per *Twomey, J.*)**—Power to sign accommodation notes may be inferred from power to sign promissory notes.**

Powers of attorney are to be construed strictly, that is to say, where an act purporting to be done under power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that, on a fair construction of the whole instrument, the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication, [P 251 C 1]

Twomey, J.—A power to sign accommodation notes may well be inferred from a power to sign promissory notes jointly with others. [P 250 C 1]

(b) Promissory note—Liability—Note signed jointly and severally.

When two Chetty firms sign joint and several promissory notes, they are both jointly interested in the moneys borrowed. [P 252 C 1]

(c) Evidence Act (1 of 1872), Ss. 102 and 103—Joint executants must prove knowledge of payee that he signed as surety, to escape liability.

If one of the joint executants desires to escape liability, the burden of proof lies on him to prove that the payee had notice and knowledge that he signed merely as a surety for the other: *Bryant* v. *La Bunque du Peuple*, (1893) *A. C.* 170, *Ref.* [P 249 C 2]

Lentaingne (Senior)—for Appellants.

N. M. Cowasjee—for Respondent.

Twomey, J.—The plaintiff-appellant bank advanced Rs. 60,000 to two Chetty agents, Kaderasan and Lutchmanan, on a joint promissory note signed by them on behalf of their respective firms, A. S. P. L. S. and A. A. The principal

question in this case is whether the A. S. P. L. S. Firm is liable to the bank on the promissory note signed by its agent, *K K's* powers were limited by a formal power-of-attorney which the bank had seen and noted. The bank therefore was fully cognizant of the extent of his authority.

The A. S. P. L. S. Firm repudiate the transaction as being beyond the scope of the agent's authority. They plead that the firm received no benefit from the transaction and that *K*, in signing the pro-note, was merely acting as surety for the co-signatory A. A Lutchmanan. The power-of-attorney contains no express authority to sign pro-notes for the accommodation of strangers to the firm. It is agreed that as the power-of-attorney authorizes the agent to make, draw and sign pro-notes "in his absolute discretion," this includes the power of making, drawing and signing even as surety for another. But it is a well-established principle that general words in a power-of-attorney cannot be construed as conferring general unrestricted powers. They are limited by the purpose for which the power is given and must be restricted by the context. In the present case the main purpose of the power was that the agent should manage and conduct the business of the principal as a "banker, money-lender and general trader." The authority to make, draw and sign pro-notes, etc., must be construed with reference to this general purpose and so as to exclude the exercise of any power which is not warranted either by the terms used or as a necessary means of executing the authority with effect. It cannot be contended that a business such as that for which this power was given, namely the business of a Chetty money-lender, necessarily involves the drawing of pro-notes as surety for strangers. It may be that Chetties do frequently sign joint pro-notes as sureties, but that does not make it a necessary incident of a Chetty's business. It is plain that a money-lending business can be effectually carried on without entering into such accommodation transactions. The only kind of borrowing expressly authorized by this power is that of borrowing money from banks, etc., with or without pledge of securities for moneys advanced to various persons.

The plaintiff-appellant bank however pleaded that the respondent firm is liable for its agent's act, because the agent did not ostensibly sign merely as a surety and because to all appearances it was a joint transaction in which each signatory was partaking as principal (i. e., principal as distinguished from surety). The learned Judge on the original side placed on the plaintiff-appellant bank the burden of showing that the respondent firm was substantially interested in the transaction, that is to say of proving that the agent *K* did not sign merely as a surety for the co-signatory. And the learned Judge found, as a matter of evidence, that the respondent firm was not interested at all and that *K* signed merely as a surety. We are asked to hold that the learned Judge erred in thus laying the onus of proof on the plaintiff bank and that the respondent firm should have been required to show that the bank had notice of the alleged fact that *K* was signing merely as a surety.

My learned colleague has accepted this contention and has found after a careful examination of the evidence that the respondent firm failed to discharge the burden of proving knowledge on the part of the bank that Kaderasan was signing the promissory note merely as a surety for the Firm A A

But it seems to me that any detailed examination of the evidence is unnecessary in view of the admission made before the learned Judge on the original side and the admissions made before us at the hearing of the appeal.

It was admitted on behalf of the respondents on the original side that if the bank did not know that the agent *K* signed merely as a surety, then *K's* firm A. S. P. L. S. would be liable. Now *K* did not sign merely as a surety if the A A Firm took a moiety or indeed any share of the money. On the joint note *K* would be still signing as a surety in respect of the share taken by the A. A. firm. *K's.* firm would be interested in the transaction to the extent of the share taken by *K* for them and *K* would be signing as principal in respect of this share. If *K's* firm got any share in the loan, *K* would not be signing merely as a surety. From the pleadings therefore it would appear that the respondents admitted by implication that the bank would be justified in lend-

ing on the joint pro-note provided that *K* was receiving some of the money for his firm. This inference was fully borne out at the hearing of the appeal when the respondent's counsel expressly admitted that Kaderasan could borrow jointly with another Chetty. Mainly the respondents' contention was that *K* exceeded his authority as agent, not by signing a promissory note jointly with another Chetty, but by signing a joint note when the other Chetty was getting the whole of the money. It was perhaps open to the respondents tc go further and contend that under the power *K* had no authority to sign a promissory note jointly with another Chetty in any circumstances whatever. But they never advanced this contention and whatever our opinion may be as to the construction of the power, I do not think it would be right for us at this stage of the case to say that the respondents have admitted too much and that they should not be held to their admissions.

The effect of these admissions, express and implied, is to my mind conclusive. If the agent was authorized to sign a promissory note jointly with another Chetty, then he was acting within the scope of his authority in signing the note in suit and the bank need not concern itself at all with the ultimate destination of the money advanced.

In the circumstances I am unable to share my learned colleague's view that the bank would fail if the respondents could prove that Kaderasan to the knowledge of the bank signed merely as a surety for the A A Firm, for a power to sign accommodation notes may well be inferred from a power to sign pro-notes jointly with others. For these reasons I concur in the orders which my learned colleague proposes to pass varying the decree of the original side.

Hartnoll, J.—The Bank of Rangoon has sued Ramsawmy Chetty carrying on business under the style of Firm of A. A. Subramanian Chetty and Somasundaram Chetty carrying on business under the style of Firm of A. S. P. L. S. and Ismail Burrabhoy to recover the principal sum of Rs. 60,000 due on a promissory note signed by Lutchmanan Chetty on behalf of the A. A. Firm and by Kaderasan Chetty on behalf of the A. S. P. L. S. Firm and dated 12th August 1907, together with the interest that has accrued thereon. Ismail Burrabhoy was sued, as it is stated that at the time the promissory note was executed there was depcsited with the bank a mortgage-deed executed by him in favour of the A. A. Firm as collateral security. The principal sum secured by the mortgagedeed was Rs. 65,000. Subaramanian Chetty and Somasundaram Chetty were alleged to be partners. Somasundaran contested the suit by stating that he was not a partner in the A. S. P. L. S. Firm. The learned Judge on the original side found that it was not proved that Somasundaram Chetty was a partner and so the suit was dismissed against him.

The suit was also dismissed against Subramanian as it was found that the power which he gave his agent Kaderasan Chetty did not authorize him to sign as surety for another firm that he did sign the promissory note in question in such capacity, that no part of the money borrowed on the promissory note was taken either by Kaderasan Chetty or by Subramanian and that the bank through their Shroff, Pasupathi Iyer, had notice that Kaderasan was signing the name of Subramanian simply as surety for a loan advanced solely for the benefit of the A. A. Firm. As regards the other defendants, tbe bank was given the relief asked for. The learned Judge gave Subramanian and Somasundaram separate costs as regards counsel's fees. This appeal has been laid on the ground that the suit was wrongly dismissed against Subramanian and that the learned Judge erred in awarding Somasundaram his full costs. They still maintain that he is a partner in the A. S. P. L. S. Firm, but do not desire to appeal against the finding that he was not. It must be taken, therefore for the purpose of this appeal that the firm of A. S. P. L. S. consisted of Subramanian only. Subramanian Chetty gave a power-of-attorney, dated the 10th June 1903, to Somasundaram to transact his affairs. The power authorized Somasandaram to appoint a substitute in his place, such substitute to have the same powers as he had. In pursuance of such authority Somasundaram appointed one Kaderasan as his substitute on 2nd November 1905. It is admitted that Kaderasan while acting in Somasundaram's place had the

same powers as he had. The plaintiff bank saw and noted the power-of-attorney given by Subramanian to Somasundaram or the deed of appointment by Somasundaram in favour of Kaderasan on 6th January 1906. The Bank, therefore must be held to have knowledge of both deeds.

The first point for consideration is whether Kaderasan had power as the agent of the A. S. P. L. S. Firm to sign a promissory note merely for the accommodation of another firm and in order to determine whether he had such power or not, the power-of-attorney granted by Subramanian to Somasundaram must be scrutinized and construed. As was enunciated in the case of *Bryant, Powis and Bryant, Ld.* v. *La Bangue du Peuple* (1) powers-of-attorney are to be construed strictly, that is to say, where an act purporting to be done under a power-of-attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication. Learned counsel for the bank relies on the following words in the power: "To make, draw, sign, accept, endorse, negotiate and transfer all and every or any bills of exchange, promissory notes, hundis, cheques, drafts, bills of lading and all and every other negotiable securities whatsoever to which my signature or endorsement may be required or which my said attorney may *in his absolute discertion* think fit to make draw, sign, accept, endorse, negotiate and transfer *in my name and on my behalf.*" Great stress is laid on the words which I have underlined (italicised) But it seems to me that to arrive at a decision on the point at issue the instrument must be looked at as a whole. Subramanian begins by describing himself as a banker, moneylender and general trader and then he goes on to appoint Somasundaram as his attorney to do various acts. The first is to transact, conduct and manage all and every or any of the affairs, concerns matters and things in which he is now or may hereafter in any wise be interested and concerned and for that purpose to use and sign his name to all and every or any documents or document, writings or writing whatsoever. Then follow a power to borrow money from any bank, etc, either with or without pledge of securities for moneys advanced to various persons. Then follows the clause which I first set out and which is relied on by the bank. Then follows clauses to examine and settle accounts, to demand and sue for debts, dues, goods, effects and things belonging to Subramanian, etc., and to give, sign and execute receipts, etc,, to represent Subramanian in Court to act for him in actions, to compound or compromise for the payment of debts, etc., to enter on immovable properties in which Subramanian may be interested etc., to pay rents and taxes, etc., to let lands in which he may be interested to recover rents, etc., to transfer and assign sales and mortgages in which he may be interested to sign all deeds of sale, etc. to appear before the Sub-Registrar and to deal with all moneys received by him under and by virtue of these presents.

Then follow the words: "To sign my name, to make and execute on my behalf cheques, contracts, agreements, deeds transfer and assignments and instruments whatsoever requisite or necessary for all or any of the purposes aforesaid and generally in and about the said premises to execute and do every deed and thing requisite and necessary *for all or any of the purposes aforesaid* as fully and effectually to all intents and purposes aforesaid as I myself could do if personally present." The power appears to me to be one constituting an agent to conduct Subramanian's business of banker, money-lender and general trader and although taken by itself the clause relied on by the bank is in the widest possible terms, I am of opinion that it should not be given the widest possible meaning and that it should only be held to authorize the making and assigning of promissory notes, etc., which would be made and signed in the ordinary course of transacting Subramanian's business, and that it should not be held to authorize any transaction outside the scope of such business. Construing the clause in this manner, is there any evidence on the record to show that it was an ordinary part of Subramanian's business to sign promissory notes merely for the accommodation of another firm? There

(1) (1893) A. C. 170=1 R. 336=62 L. J. P.C. 68 =68 L. T. 546=41 W. R. 600.

is nothing from which such an inference can be drawn. On the other hand the evidence goes to show that when two Chetty Firms sign joint and several promissory notes, they are both jointly interested in the moneys borrowed. I would therefore hold that it is not proved that the power authorized Kaderasan to sign his principal's name merely for the accommodation of another, so that this ground of appeal fails.

It becomes now necessary to go into the facts. There is no doubt that Lutchmanan on behalf of the A. A. Firm and Kaderasan on behalf of A. S. P. L. S. Firm did execute Ex. D a joint and several promissory note, for Rs. 60,000 on 12th August 1907 and that the consideration for it was the renewal of a debt of Rs. 30,000 incurred by both of them on behalf of their firms on a joint and several promissory note, dated 8th July 1907, a cheque on the Bank of Bengal for Rs. 2.000 in favour of A. A. Lutchmanan and Rs, 10,000, in cash. The manager of the bank, Churchward, says that he had no knowledge when the loan was given, that Kaderasan was signing as a surety and after studying his evidence and considering the other facts of the case and the form of the promissory note. I can see no reason to doubt this statement. The respondents allege that the shroff of the bank, one Pasupathi Iyer, knew that Kaderasan signed merely as surety and claimed that this was notice to the bank that he was doing so. On the original side this burden of proof showing that the A. S. P. L. S. Firm was interested in the consideration for the note was placed on the bank, but I am of opinion that this was wrong. In the case of *Bryant, Powis and Bryant, Ltd.* v. *La Banque du Peuple* (1) the following passage, which occurs in the case of *President, etc.,of the Westfield Bank* v *Conen* (2), which was delivered by the Court of appeal of the State of New York, was approved of by their Lordships as well stating the law. It is as follows :

"Whenever the very act of the agent is authorized by the terms of the power, that is, whenever by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding on constituents, as to all persons dealing in good faith with the agent, such persons are not bound to inquire into facts aliunde. The apparent authority is the real authority."

(2) 37 N. Y. R. (10 Tiff.) 322.

During the course of the trial before the learned Judge on the original side, it was admitted by the counsel of A. S. P. L. S. that, if the bank did not know that Kaderasan signed merely as surety, the A. S. P. L. S. Firm would be liable. This admission seems to me to amount to an admission that the appellant bank was justified in advancing to the A. S. P. L. S. and A. A. Firms money on a joint and several promissory note signed by their agents and that the A. S. P. L. S. Firm would be liable for the money so borrowed if the bank did not know that their agent signed meroly as surety. This was the position taken by the counsel of the A. S. P. L. S. Firm at the hearing of the appeal when it was again admitted that the agent of the firm had power to borrow jointly with another firm. It may be said that when two persons jointly and severally borrow money on a promissory note and each takes a share in the money so borrowed, each stands security for the other for the amount taken by him. The A. S. P. L. S. Firm might have contested its liability to the bank on such a ground, but it did not do so. On the contrary it admitted its liabiliaty in such a case. It therefore seems to me that such an aspect of the case should not be considered. Taking the admission with the extract from the judgment I have just quoted it seems to me that the position is that prima facie the bank was justified in advancing the money as it did, since it is allowed that the agent of the A. S. P. L. S. Firm could borrow jointly with another firm and that is what he purported to do when he signed the promissory note of 12th August 1907. If the A. S. P. L. S. Firm desires to escape liability it is for them to show that their agent signed merely as a surety to the knowledge of the bank.

The case seems to fall within both S. 102 and S. 103, Evidence Act. Now has Subramanian proved that the bank had such notice ? He calls Lutchmanan Chetty to prove that the Shroff of the bank, Pasupathi Iyer, knew that the money was wanted by the A. A. Firm only, that in fact it was Pasupathi Iyer himself who told Lutchmanan to get an-

other man to stand as surety. He also calls Subbia, who was a clerk in the employ of the A. S. P. L. S. Firm from 1905 to 1908, to produce certain books of the firm and prove that the firm did not get any of the Rs. 60,000. He also relies on the fact that the mortgage deposited as collateral security when the note was signed, was one in favour of the A. A. Firm and had nothing to do with the firm of A. S. P. L. S. The sum secured by the mortgage was Rs. 65,000. In the face of the promissory note itself the argument as to the deposit and ownership of the mortgage does not carry us very far, Churchward cannot be expected to know the mutual arrangements between borrowers from the bank. As a matter of fact Subbia's evidence shows that the two firms were constantly having transactions with each other and if both firms were interested in this promissory note for Rs. 60,000 it is not improbable that the A. A. Firm would have deposited the mortgage as security for the mutual benefit of themselves and the A. S. P. L. S. Firm. The most important witness is Lutchmanan Chetty, as he is the only one who can give direct evidence that Pasupathi Iyer knew that Kaderasan Chetty signed as surety. Is he trustworthy and credible? It may possibly be that Kaderasan did sign as a surety merely aud that his firm did not participate in the loan and even if so it may also possibly be that nothing was said to the bank officials to Pasupathi Iyer or anyone else when the note was signed that Kaderasan was signing as a surety. If nothing was said then to the effect that he was a surety even if he was he would bind his principal for the reasons which I have already given since the bank would not have had notice. The credibility of Lutchmanan Chetty or otherwise therefore becomes very important.

As I have already stated he says that Pasupathi Iyer asked him to get another man to stand as surety and that he got Kaderasan. He says that the money was taken by his firm and that interest was paid by his firm, but he produces no books to show this. When cross-examinod he allows that Kaderasan told him that his principal had not permitted him to sign and borrow for another and that he had given express directions not to borrow for another and that he (Kaderasan) signed the promissory note to oblige his (Lutchmanan's) master. He allowed that Kaderasan was wrong in signing without his principal's permission. He also said that Kaderasan used his principal's name in signing the promissory note at their request to oblige them. That he should allow Kaderasan to do a wrongful act of this nature is an important fact in considering his credibility as a witness. If he could acquiesce in Kaderasan doing such a wrongful act, is it probable that, if it suit his purpose, he would hesitate to tell a lie in the witness box? His evidence is not satisfactory in other ways.

He said: "I do not remember if Rs. 30,000 out of the sum of Rs. 60,000 was withheld by the bank and taken towards a debt due by me already." So his recollection of the details of the transaction was not very vivid. If he could not recollect that Rs. 30,000 of the consideration was on account of the renewal of an old debt, how does he recollect that Kaderasan signed as a surety? He went on to say: "Kaderasan Chetty and I had jointly borrowed Rs. 30,000 before that. I took that money. It was money got in cash. I have borrowed money in the National Bank of India, Chartered Bank of India and Bank of Burma. I might have borrowed jointly from these banks with Kaderasan Chetty. In some cases he would have stood surety for me and in some cases we might both have taken the money. In the Bank of Rangoon also we have borrowed money for both of us together. I do not remember if we both borrowed Rs. 30,000 from the Bank for both of us." In re-examination he said: "I paid back the sum of Rs. 30,000 borrowed by me with the joint signature of Kaderasan from the bank." Now Churchward, the manager, says, and there is no reason to disbelieve him, that except for the two loans of 8th July and 12th August he has never given any other loans to the two firms of A. A. and A. S. P. L. S. together and that he has never received any other promissory notes from them together. When therefore Lutchmanan Chetty allowed tbat in the Bank of Rangoon he and Kaderasan had borrowed money for both of them together, what loan was he referring to?

Or was the statement a loose and random one? If it was a loose and random one, the fact that he should make it goes to impair his credibility. If it was a true statement, it must refer to either the loan on 8th July or that of 12th August. His evidence as regards the loan of Rs. 30,000 is unsatisfactory. He first said he took the money, then that he did not remember if they both borrowed Rs. 30,000 from the bank for both of them and then in re-examination said that he paid back the sum of Rs. 30,000 borrowed by him with the joint signature of Kaderasan from the bank.

The learned Judge on the original side has remarked that as regards Lutchmanan's interest, it is more in favour of the bank's case in that if his accounts were passed on the footing that the A. A. Firm got only a share of the loan, which would be the case, if the story he told in the witness box was false, and at the time of their being passed he had suppressed the fact that he really had got all the money himself, clearly that would entitle his late employers or their creditors to re-open the account and to recover from him in respect of the balance. He says that he pays income tax to the extent of Rs. 700 a year and if that is so he has means. He says that he was agent of the A. A. Firm from 1904 to 1908. So at the time of his giving evidence he was presumably not in their employ. The A. A. Firm did not appear to defend the suit. According to Subbia the A. A. Firm got into difficulties in 1908, and it may, therefore have been insolvent when the suit was brought. If so, nothing more could be recovered from them in this suit than could be recovered by the sale of the collateral security deposited at the time. The promissory note was filed, and this would be recoverable from them in any case. Assuming that the full amount due on the promissory note would not be recovered by the sale of such security and that nothing more could be recovered from the A. A. Firm, the question arises whether Lutchmanan would have anything to fear from the A. A. Firm from going into the box and telling a story that, if believed, would free the A. S. P. L. S. Firm from liability. The books of the A. A. Firm may show that they only got half of the Rs. 60,000 and they may know that they only got half. If they are in difficulties or insolvent, they may have nothing to gain by bringing a suit to enforce from the A. S. P. L. L. Firm a half-contribution of what has been recovered from them or by bringing a claim against Lutchmanan, which they may know to be false, simply to take advantage of his giving false evidence.

It may even be possible that knowing the only tangible property of theirs that can be proceeded against is the mortgage deposited, they have connived with the A. S. P. L. S. Firm to reduce their joint liability to the bank. I do not think that due weight can be given to any such considerations as to what was Lutchmanan's interest. His evidence must be taken, analyzed and pronounced on as it stands. The evidence of Subbia remains. He states that he was a clerk in the employ of the A. S. P. L. S. Firm from 1905 to 1908. He produced the following books of the Firm: (1) a ledger account for the period from November 1905 to November 1907, the ledger containing the account of the Bank of Rangoon, (2) a daybook beginning from 14th March 1907 up to the time he gave his evidence, (3) two current account books. He says that between 1905 and 1907 there is no entry of a debt on the joint signatures of A. A. and A. S. P. L. S. and it is clear that there is no note of such a transaction in the book produced. The point is whether the books can be relied on as correct and trustworthy for the entries made in them in Kederasan's time. It must be remembered that the A. S. P. L. S. Firm allows that Kaderasan was a bad servant to them and did nct conduct their business properly. Subbia says that he was prosecuted for a defalcation in Rangoon. A study of Subbia's evidence leads me to note as follows: The two current accounts give ledger accounts with the different persons with whom A. S. P. L. S. had dealings. Ex. P contains accounts with two people other than Chetty Firms. No such ledger account was produced in regard to transactions with the A.A. Firm, though looking at the evidence of joint transactions between the two firms, it would be expected that one would be in existence. If separate ledger accounts were kept for dealings with others, why was not one kept for dealings with the A.A. Firm? Towards the commencement of his cross-examin-

ation Subbia said that the accounts of his firm with the A.A. Firm were not in the ledger he produced, but in another ledger which he had at this house and that they had with the A.A. Firm the current account ever since his firm started up to the time their firm got into difficulties in January 1908. The next day he brought two current account books, and at first said that he would have to find out where A. A's account was and that he had not looked into it at home. He then said that the account was not in the two books. His explanation as to the variance between his evidence does not seem to me to be satisfactory. He distinctly said at first there was a separate current account with the Firm of A.A. As there were such for transaction with others, why was there not one with A.A.? The impression left on my mind is that there may be such a one with A.A. and that it may have been suppressed.

Then looking at the ledger account produced (p. 173) there is a note under date 7th October 1907 of a joint transaction with A.A. in respect of borrowing Rs. 30,000 from the Chartered Bank. The entry runs: "7th October 1907. Credit as on this date in respect of our share out of a demand loan of Rs. 30,000 taken jointly with A.A. on 27th August deducting half (of it) to the above, Rs. 15,000."

The entry goes on to show that the loan was taken on 27th August and yet it was not entered till 7th October. If this was so, it would tend to show that the books may not have been kept correctly and carefully. It must be that the books would in 1907 be under the charge of Kaderasan, a man who did not conduct the business properly and was subsequently prosecuted for defalcation. Subbia on being asked to explain the entry said: "The loan was raised on 27th August, but it was entered on the 7th October. The reason why it appears on 7th October though money was borrowed on 27th August is that the loan was renewed on that day. Entry in the ledger shows that our firm got the money on 27th August. There is nothing in the daybook re the loan of Rs. 30,000 (he means under date 27th August as I have verified from the day book). It is also possible that on paper was 27th August, but the money was actually taken on 7th October." Such evidence does not explain satisfactorily how a loan apparently recorded as taken on 27th August was not entered till 7th October. If omission on due date to enter could occur once, is it possible the transactions in question were omitted to be entered on due date and subsequently not entered at all? There is another item of account that does not seem to me to be very satisfactory, and that is the item marked as Ik. under date 29th May 1906. It says: "Credit in respect of a two months' term (thavenai) loan 'signed' by C. V. C. T. bearing 9 per cent. interest—Rs. 30,000." Subbia says that it does not appear that the C. V. C. T. got everything out of this amount. The loan was from the Bank of Rangoon.

The voucher of the bank showing particulars with regard to it is Ex. G3. That voucher shows that the Rs. 30,000 were paid by cash Rupees 19,000 and by a cheque in favour of the C. V. C. T. Rs. 11,000. There is no reason to doubt the genuineness of Ex. G3. Looking at the C. V. C. T.'s ledger account it does not help us to explain how a cheque for Rs. 11,000 was given to them, if they did not participate in the loan. Subbia does not satisfactorily explain the Rs. 431-8-0 in Ex. 4, the Rs. 438-4-0 in Ex. H-2 and the Rs. 451-3-6 in Ex. K-2. When Subbia comes to give evidence as to transactions between his A. A. Firm he says: "I cannot say what the state of account was between A. A. Firm and our firm on 8th July 1907. I shall have to work it out. I cannot say whether a balance of Rs. 50,000 might have been owing from one firm to another. 1907 August 12th. I cannot say what was the state of accounts between A. A. Firm and our firm. I cannot say whether a balance of Rs. 60,000 might have been owing from the one to another. Though I conduct the case now on behalf of the defendant I have not looked into the state of affairs in August 1907 for the purposes of the suit. As we have no current account between the two firms, I shall have to examine all books of bank loan transactions to find that out. Bank loan transactions, if carried into another, then that must be looked into. I will have to work out from Ex. I. I think the account has not been carried into

any other book. I think their account must appear only in the book." He is then taken through entries in the ledger beginning from the 8th July 1907, the date of the first promissory note. It would have been more satisfactory if Subbia had been able to give more definite evidence about the state of the account between the two firms on 8th July 1907. As regards the transactions of the 8th July and 12th August 1907 it is impossible to say from the entries as they stand that the A. S. P. L. S. Firm benefited from the loans taken from the Bank of Rangoon on that day. Rs 30,000 were taken from the A. A. Firm on the 12th August, Rs. 28,000 being repaid on the 13th August, but this does not show that both firms benefited equally from the extra Rs. 30,000 taken on that day.

If the books can be believed and trusted, they may be said to show that the A. S. P. L. S. Firm did not jointly borrow the Rs. 60,000 from the Bank of Rangoon, but in the face of my analysis of Subbia's evidence can they be trusted? There is the fact of Kaderasan's character, the non-explanation of an entry of a loan apparently taken on the 27th August 1907 till the 7th October, the giving of a cheque for Rs. 11,000 to the C. V. C. T. as part of consideration for a loan which according to the books, the Firm C. V. C. T. did not participate in and the non-explanation of some minor sums. There is further the fact that no separate current account with the A. A. Firm has been produced though such an account seems to have been kept in respect to transactions with others and the fact that Subbia does not give definite evidence as to the state of the account between the two firms on the 8th July 1907, the date of the first loan. I think that special stress should be laid on the non-production of a separate current account with the A. A. Firm and the suspicion which arises that there may be such an account the fact that it is possible that a loan taken on the 27th August was not entered into the ledger till the 7th October and the fact that a cheque for Rupees 11,000 was given to the C. V. C. T. Firm when a loan was being disbursed by the Bank on the joint liability of the A. S. P. L. S. books, showing apparently that the C. V. C. T. Firm did not participate in it. I do not think that under the circumstances the books can be implicitly relied on.

Respondent's Counsel comments strongly on the fact that Pasupathi Iyer has not been called by the bank, and from Churchward's evidence it would appear that effective steps could have been taken to examine him. It is explained in paragraph 11 of the appeal why it was not thought necessary to examine him, and the bank's counsel said at the hearing that it was too late to examine Pasupathi Iyer on commission after Lutchmanan's evidence had come back as the case had been in the warning list. The witnesses were not examined till long after Lutchmanan had been examined, and I am of opinion that it was a grave omission on the part of the bank to have taken no steps to secure Pasupathi Iyer's evidence. It must be however remembered that according to Churchward's evidence, at the time of the hearing Pasupathi Iyer does not seem to have been in the service of the bank and if this is so, one of the main reasons for thinking that he might depose untruly in favour of the bank had ceased to exist. In the circumstances why did not the A. S. P. L. S. firm take steps to secure his evidence?

But in any case the burden of proof lay on the A. S. P. L. S. firm to prove that the bank had notice that their firm was not interested in the loan evidenced by the promissory note for Rs. 60,000 and on the evidence produced, I am unable to find that they have proved that the bank had such notice. In the first place it does not seem to me that they have proved that they were not interested in either of the sums of Rs. 30,000 and in the second, even assuming that they were not interested in either of such sums and that it is a fact that Kaderasan signed both notes merely as a surety, I am unable to hold that on the unsatisfactory evidence of Lutchmanan Chetty it is proved that Pasupathi Iyer knew or had notice that Kaderasan signed merely as a surety. If he did sign merely as a surety, it may possibly have been that he did do so without anything being said about it to Pasupathi Iyer. All parties may have then been of opinion that the power gave Kaderasan authority to sign his principal's name as surety, and if so there would be no special reason for any talk as to the capacity in which Kaderasan signed, and in considering whether this is what actually took place the credibility of that part of Lutchmanan's evidence,

in which he says that Kaderasan told him that his principal had not permitted him to sign and borrow for another and that he had given express instructions not to borrow for another and that he had signed to oblige him, comes into question. Is such a story likely to be true ?

In this view it is unnecessary to discuss whether if Pasupathi Iyer knew that Kaderasan signed merely as a surety such knowledge would be notice to and would bind, the bank.

One further point remains, and that is whether Subramanian and Somasundaram should have been each allowed counsel's fees. I would not interfere with the order of the learned Judge on the point, as Somasundaram had to meet quite a different case to the case Subramanian had to meet.

In the result I would vary the decree passed by the learned Judge on the original side by ordering that the names of the legal representatives of Subramanian now deceased, namely Somasundaram Chetty and Shanmugam Chetty be added to that of Ramaswamy Chetty as being liable to the bank in the sum of Rupees 78,744-10-6 for principal and interest and that the same decree be passed against them all three as was passed against Ramaswamy Chetty. I would also give the bank costs against the firm of A. S. P. L. S., i. e., now Somasundaram Chetty and Shanmugam Chetty in their capacity as legal representatives of Subramanian Chetty on the original side and in this appeal.

I would not allow Somasundaram costs as an individual respondent in this appeal.

K.N./R.K. *Decree varied.*

A. I. R. 1914 Lower Burma 257 (1)

FOX C. J. AND HARTNOLL, J.

R. M. Ramanathan Pillay — Applicant.

v.

M. L. V. E. R. M. Firm — Respondents.

Civil Misc. Appeal No. 105 of 1913, Decided on 12th March 1913, against order of Dist. Judge, Insein.

Provincial Insolvency Act (3 of 1907), S. 46—Appeal from order dismissing petition for fraud and abuse of process of law is incompetent without leave of District Court or High Court.

Except with the leave of the District Court or of the High Court an appeal will not lie from an order of dismissal of an insolvency petition made on the ground of fraud and abuse of the process of the Court. [P 257 C 2]

Maung Pu—for Applicant.

Chari—for Respondents.

Fox, C. J.— The petition was dismissed because the Judge thought there had been fraud on the part of the petitioner and that the petition was an abuse of the process of the Court.

Sub-S. 2, S. 46, Act gives an appeal from an order made under S. 15, but this order was not made under any of the sections mentioned in that subsection.

For an appeal against any order not made under the sections mentioned in sub-S. 2 the leave of the District Court or of the High Court has to be obtained. The appellant applied to neither Court for leave to appeal. The appeal must be dismissed.

Hartnoll, J.—I concur.

K.N./R.K. *Appeal dismissed.*

A. I. R 1914 Lower Burma 257 (2)

PARLETT, J.

Maung Kyaw Yan— Defendant — Appellant.

v.

Ma Nyo U—Plaintiff—Respondent.

Second Appeal No. 100 of 1912, Decided on 22nd July 1913.

Buddhist Law (Burmese) —Divorce — Mere caprice not ground for quarrels — Petty quarrels should not be magnified into cruelty.

A divorce cannot be granted on mere caprice, and petty quarrels must not be magnified into acts of cruelty and ill-treatment of a nature sufficiently grave to justify divorce. [P 258 C 1]

The parties had both been married before, the defendant being 53 and the plaintiff 40 years of age, the latter having a family by her former marriage. They lived together for two years, perhaps not as amicably as might be. On 28th October 1911 the appellant missed rice, plantains and cocoanuts and accused his wife of taking them to give to her children and told her to go away from his house. She did so and went to her parents' house. She then attempted to get a divorce before the headman without success and on 11th November 1911, the 14th day after the quarrel, she filed a suit. A decree as if by mutual consent was given for divorce and confirmed on appeal. Second appeal was lodged.

Held: that the facts stated above did not constitute such cruelty as entitled the plaintiff to a divorce, even as by mutual consent, and that the matter was a petty quarrel such as a Court should not treat as sufficient ground for a divorce on any terms: *S. J.* 607, *Foll.* and 3 *I. C.* 715, *Ref.* [P 258 C 1, 2]

K. B. Banerji—for Appellant.

Karaka—for Respondent.

Judgment.—Respondent sued appellant for a divorce on the ground of ill-treatment and obtained a decree for divorce as if by mutual consent, which has been confirmed on appeal. This appeal is lodged on the ground that the decree was passed on grounds insufficient in law. Various rulings have been cited in the lower Courts and in this Court. As regards *Ma Ein* v. *Te Maung* (1) the question on the grounds on which a divorce as by mutual consent could be obtained by a wife after ill-treatment was not raised or decided. No doubt the Upper Burma case of *Maung Pye* v. *Ma Me* (2) lays down that misconduct on the part of a husband which may not in itself be sufficient to entitle a wife to divorce under the rule of separation where the husband is the offender, may nevertheless be sufficient to entitle her to insist on a divorce as by mutual consent. I should be loth to question so high an authority nor is it necessary to do so, for it does not lay down that the ill-treatment to be sufficient for a divorce by mutual consent need not be of a substantial nature, where it is clear that in that particular case the ill-treatment was very severe, varied and protracted. So far as I am aware the dictum of the learned Judge in *Mi Po Du* v. *Maung Shwe Bauk* (3), that a divorce cannot be granted on mere caprice and that petty quarrels must not be magnified into acts of cruelty and ill-treatment of a nature sufficiently grave to justify divorce, has never been dissented from, and becomes it appears to me, of even greater weight as civilization and enlightenment progress.

The facts in the present case are that the parties had both been married before, appellant being now 53 and respondent 40 years of age, the latter having a family by her former marriage. They lived together for two years, perhaps not always as amicably as might be, and on 28th October 1911 appellant missed rice, plantains and cocoanuts, and accused his wife of taking them to give to her children, and told her to go away from his house. She did so, and went to her parents' house. She then attempted to get a divorce before the headman without success, and on 11th November 1911, i.e., the fourteenth day after the quarrel, she filed this suit. Respondent asked her to return to him and she refused. The question is whether in law these facts constitute such cruelty as to entitle her to a divorce, even as by mutual consent. I have no hesitation in holding that they do not. It is a misuse of terms to say that appellant brought an unfounded charge of theft against his wife and turned her out of the house. He was no doubt annoyed at the loss of his things, and perhaps not unnaturally assumed that his wife's former family, who appear not to live with them had the benefit of them, and this he would naturally resent. Clearly telling her to leave the house was no hardship to her, as she had her parents' house to go to and was ready enough to go, while appellant was anxious to make amends. I consider that the matter was a petty quarrel such as a Court should not treat as sufficient ground for a divorce on any terms.

I therefore reverse the decree of the District Court and dismiss the suit with costs, advocate's fee in this Court two gold mohurs.

K.N./R.K. *Appeal accepted.*

(1) [1909] 5 L. B. R. 87=3 I. C. 715.
(2) [1902-03] 2 U. B. R. 6.
(3) S. J. 607.

A. I. R. 1914 Lower Burma 258

TWOMEY, J.

Htaung and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 3 of 1914, Decided on 23rd February 1914.

(a) Criminal P. C. (5 of 1898), S. 103—Search list added to after being signed by witnesses—Search is not invalidated.

A police officer should not add any new items to a search list after it has been signed under S. 103, but his doing so would not be a breach of S. 103 invalidating the search. [P 259 C 1]

(b) Burma Gambling Act (1 of 1899), S.3—Common gaming house explained.

Where it is not proved that gambling at a club was confined to the members of the club, the place called the club might be a "common gaming house" as defined in S. 3, even though the profits of the gaming carried on at the club are devoted to feasting and to the general purposes of the club. [P 259 C 2]

Order.—In this appeal it is contended that the presumption allowed by S. 7, Gambling Act, does not arise as the provisions of S. 103, Criminal P. C., regarding searches were not observed as required by S. 6, Gambling Act. It is also contended that if the presumption

does arise it has been rebutted by the defence evidence showing that the place was a club and that the money taken by way of commission from the players "was not spent for the profit or gain of the club, but in payment of the regular club expenses."

As regards the first point it is alleged that when the list of property seized was signed by the two "respectable inhabitants" who witnessed the search, the list was not complete. I regard it as established that the list was drawn up at the place of search and signed there by the police officers and the two witnesses. The witness King said at first that he did not sign till he got to the police station, but he corrected himself afterwards and explained that what he signed at the police station was not the list of property seized but a security bond. In view of the other witnesses' statements I think this explanation is probably correct and King's statement as to signing the search list at the police station was a bona fide mistake.

There can be no doubt that items 28 and 29 were added to the list at the police station, that is to say, after the witnesses had signed the list. These two entries relate to: (1) a sum of Rs. 36-5-0 found in a locked box, and (2) a bunch of keys taken from one of the accused when he reached the police station. The locked box was already in the list (item 6) though it was not opened till it reached the police station and the bunch of keys was obtained. The Inspector should not have added the Rs. 36-5-0 and the keys to the already completed list. But I cannot hold that his doing so was a breach of S. 103, Criminal P. C., invalidating the search. The list was already complete and in order when he made these unnecessary entries. It appears also that two empty tin boxes that were taken away by the police were not shown in the list. These boxes had no bearing whatever on the case and it was pure officiousness to bring them away. I cannot regard their omission from the list as a circumstance invalidating the search.

In my opinion there are no sufficient grounds for holding that the provisions of S. 103, Criminal P. C., were contravened and I therefore think that the presumption allowed by S. 7, Gambling Act, may properly be made.

The accused produced one witness who said the place was a club belonging to "Ong" Chinese Clan, that he was the Honorary Secretary, and that the profits of the gaming carried on at the club are devoted to feasting and to the general purposes of the club. A place may be called a club and yet may be a "common gaming house" within the Act. It is not proved that the gambling at this club was confined to members of the club. Even if the profits of gambling were devoted to club purposes, the place might still be a "common gaming house" as defined in S. 3 of the Act, for the word "person" in that section includes anybody of individuals, Burma General clauses Act, 1898, S. 14 (2), i. e., a club.

On these grounds I think the convictions should stand. But I can find no justification in the evidence for the imposition of heavier fines on the third, ninth and fourteenth accused than on the other accused convicted under S. 11.

The fines imposed on Chin Kee, Shin Shwe and Kyin are reduced to Rs. 5 each and the balance of the fines paid by these three appellants will be refunded to them. The appeals of the others are dismissed.

K.N./R.K. *Order accordingly.*

A. I. R. 1914 Lower Burma 259

HARTNOLL, OFFG. ~~C. J.~~
AND ORMOND J.

Emperor

v.

Me Thin and *others*—Accused.

Criminal Revision Nos. 34-B to 46-B of 1914, Decided on 31st March 1914, from order of 4th Addl. Magistrate, Bassein, D/- 30th October 1913.

Arms Act (9 of 1878), S. 19 (a)—Clasp knives are not arms.

Clasp knives are not arms within the meaning of S. 19 (a): 3 *L. B. R.* 1, *Ref.* [P 260 C 1]

Hartnoll, Offg. C. J.—These revisions concern a batch of cases in which certain persons have been convicted, under S. 19 (a), Arms Act, of exposing for sale certain clasp knives. The learned Sessions Judge has forwarded six of the knives for our inspection and says that they are typical of the rest with respect to which the convictions have been obtained. They are stout and formidable clasp knives and five of them come to a point by virtue of the outer edge narrowing as the end of the blade is

S. N. DAR, Vakil High SRINAGAR

reached. When opened the blades are not held by a spring and so they differ from the weapons described, in the case of *Ebrahim Dawoodji Babi Bawa* v. *Emperor* (1). It cannot be said that when manufactured they were primarily intended to be used for offence or defence. They are certainly useful for ordinary purposes, such as for domestic use or for cutting sticks. In ordinary parlance they would not be spoken of as arms. They are stout and formidable clasp knives. They can be used as efficient and very serious stabbing implements, but it cannot be said that from their appearance they were manufactured primarily for the purpose of being used as such.

I would set aside the convictions and acquit the persons convicted and direct that the fines imposed be refunded and that the knives produced before the Magistrate be returned to their owners.

Ormond, J.—I concur.

K.N./R.K. *Conviction set aside.*

(1) [1905-06] 3 L. B. R. 1=2 Cr. L. J. 372.

A. I. R. 1914 Lower Burma 260

PARLETT, J.

Po Gyi and *others* — Accused — Petitioners.

v.

Emperor—Opposite Party.

Criminal Revision No. 316-B of 1914, Decided on 24th November 1914.

Criminal P. C. (5 of 1898), S. 435 (4)—Revision application presented to Sessions Judge—Action by District Magistrate suo motu during pendency of application is not valid.

The entertainment of an application under S. 435, by a Sessions Judge prevents the District Magistrate from dealing with the matter suo motu. In such a case the latter's action would not invalidate an order passed by the Sessions Judge: 26 *Mad.* 477, *Dist.* [P 261 C 1]

Eggar (*Asstt. Govt. Advocate*)—for the Crown.

Judgment.—One A. R. S. P. N. K. Nagamuthu Pillay prosecuted Naga Po Gyi and two others under S. 477, I. P. C. On 20th May 1914 the Special Power Magistrate discharged the accused. On 4th June the District Magistrate called for the proceedings, which were sent to him on the 5th and apparently received in his Court on 6th June, but so far as the records show no action was taken with regard to them for twenty days, namely, till 26th. Meanwhile on 20th June Nagamuthu Pillai presented an application to the Sessions Judge under S.435, Criminal P. C. On the 23rd the Sessions Judge called for the record of the Special Power Magistrate's proceedings, his order reaching the District Magistrate on the 24th. Instead of sending the proceedings at once as they were, or even informing the Sessions Judge that they had been called for by himself, the District Magistrate on 26th June signed his name on a printed form bearing the words : "On a perusal of the record no cause appearing for interference, it is ordered that the record be returned," and returned it the same day to the Special Power Magistrate. On the 27th the Special Power Magistrate dispatched his proceedings to the Sessions Judge, who received them the same day. On 21st July the complainant's counsel was heard and notice was directed to issue to the accused. On the 27th counsel for both the parties were heard and on the 29th the Sessions Judge passed orders directing the accused to be committed for trial, and this has been done. I may note that the Sessions Judge's order was directed to the District Magistrate, who himself on 30th July issued warrants of arrest for the accused and on 5th August sent the case to the Special Power Magistrate for committal. This shows that it never occurred to the District Magistrate that he had himself already adjudicated upon the case in revision. It is now sought to have the commitment order set aside on the ground that the Sessions Judge had no jurisdiction to direct it to be made, by reason of the provisions of S. 435 (4), Criminal P. C.

It is argued that the District Magistrate's calling for the record is equivalent to his entertaining an application, and that thereafter he had exclusive jurisdiction over the matter. No authority is cited for this proposition. The case of *Kalimuthu* v. *Emperor* (1) does not support it. In that case, accused having been discharged, a revision petition was then presented to the Sessions Judge who dismissed it. At a subsequent date the District Magistrate took up the case suo motu and directed the commitment of the accused. His order was held to be invalid. The ratio decidendi was that inasmuch as he could not have passed that order upon

(1) [1903] 26 Mad. 477=2 Weir 542.

an application presented to him, a fortiori he could not do so without an application, and this may be taken to be a necessary corollary from S. 435 (4), Criminal P. C. The converse proposition however is not so, and effect must be given to the legislature asenacted. To hold that the District Magistrate by such action as he took in this case barred the Sessions Judge from adjudicating upon an application which he had already entertained would, I consider, be to make the law of non-effect by tradition.

In my opinion when the Sessions Judge entertained the application there was no bar to his doing so, whereas his entertainment of it prevented the District Magistrate from dealing with the matter suo motu.

I decline to interfere with the commitment order. The records may be returned.

K.N/.R. K. *Records returned.*

A. I. R. 1914 Lower Burma 261

FOX, C. J. AND HARTNOLL, J.

Ahmed Moola Dawood and *another*—Defendants—Appellants.

v.

Mt. Fatima Bee Bee—Plaintiff—Respondent.

First Appeal No. 78 of 1913, Decided on 7th December 1914.

Probate and Administration Act (5 of 1881), S. 78—Suit against surety in administration bond for breach is governed by Limitation Act (9 of 1908), Art. 68.

A suit to enforce the liability of a surety under an administration bond is barred under Art. 68, Limitation Act, if not brought within three years of the breach of a condition contained in the bond. [P 262 C 1, 2]

Coltman and *Alexander*—for Appellants.

Das—for Respondent.

Judgment. — One Ebrahim Sahib Khateeb died intestate at Mecca in or before 1880, leaving property in Rangoon. His widow and children continued to live at Mecca after his death. In January 1899 his eldest son Mohamed applied to the Court of the Recorder of Rangoon for letters of administration to his father's estate, and letters were granted to him. He signed an administration bond as required by S. 78, Probate and Administration Act, 1881, for Rs. 80,000. Ahmed Moola Dawood and Mohamed Ebrahim Husein Munsoor signed it as his sureties. The latter has since been declared an insolvent and is represented in this appeal by the Official Assignee. Two days after the date of letters, Mohamed filed a petition representing that the only assets of the estate consisted of some house property in Rangoon and that he was unable to administer the estate without selling or mortgaging this property. He asked for leave to be granted to him under S. 90 of the Act to sell or mortgage it. This application was granted without any inquiry. The result shows what may happen when such applications are granted without very careful and full inquiry as to the necessity for selling the immovable property which has devolved upon members of a family. The property had apparently been for many years the chief source of income of the family, and Mohamed could have carried out duties as administrator by executing a conveyance of the property to the heirs. If that had been done, there would have been less opportunity for Mohamed to commit the fraud he subsequently committed. In 1903 he sold for nearly three lakhs of rupees property which in his application for letters of administration was valued at Rs. 40,000 only. It was plainly his duty to distribute the purchase money among the heirs within a reasonable time, but he did not do so. The plaintiff, who is one of his sisters, came from Mecca to Rangoon and in 1910 instituted a suit against Mohamed for an account and an administration of the father's estate. In that suit Mohamed was held liable to pay the other heirs over three lakhs of rupees, of which over fifty-six thousand rupees was payable to the plaintiff. This amount not having been paid, she applied to the Court to assign to her the administration bond with a view to proceeding against the sureties under it. It was assigned to her on the 22nd March 1912.

She filed the suit out of which this appeal arises on 4th September 1912 and in it she sought to recover from the sureties the amount mentioned in the bond. The plaint states that the cause of action arose on 11th September 1911, which is the date of the decree in the suit she brought against Mohamed. The case has been disposed of on the point of limitation, which the original Court decided in favour of the plaintiff. The solvent

surety and the Official Assignee appeal against the decision.

The question of whether the suit was barred by limitation must depend upon what article of the Limitation Act applies to it. The bond follows a well-known English form in which the obligors first bind themselves to pay a certain amount of money to the obligee, but the latter portion says that in certain events the obligation to pay the amount shall be void. The latter portion of the bond now in question is as follows:

"The engagement of this bond is such that if Mohamed Ebrahim Sahib Khateeb, the person appointed by the Court of the Recorder of Rangoon, under the Probate and Administration Act 5 of 1881, to be the administrator of the estate of Ebrahim Sahib Khateeb deceased, who died at Mecca in Arabia on or about 9th May 1880 intestate, do make a true inventory of all the estate of the said deceased which has or shall come to his possession, power or knowledge and do exhibit the same unto the said Court on or before 18th January 1900, and the same estate and all the other estate of the said deceased at the time of his decease which at any time after shall come into possession of the said Mohamed Ebrahim Sahib Khateeb, do administer according to law, that is to say, do pay the debts which he owed at his decease and further do render a true account of his said administration whenever by law required to do, and the residue of the said estate, do pay unto such person or persons as shall be entitled thereto under the said Act * * * *, then this obligation to be void or else to remain in full force."

The last seven words contemplate that the bond shall remain in force for ever if the administrator does not do the acts previously mentioned as relieving him and the securities from the obligation to pay the amount of the bond, but the Limitation Act makes no special provision for adminstration bonds and consequently, one of the article of it must apply to a suit on it. Arts. 68 and 80 of the first division of Sch. 1 to the Act have been referred to, but as Art. 68 exactly meets the case of such a bond no other article need be considered. Under Art. 68 three years is the limitation period for a suit on a bond subject to a condition, the period begins to run from the time when the condition is broken.

It is clear from the explanation of the word "bond" in S. 2 of the Act that the bond in the present case is a bond subject to a condition provided for in Art. 68.

The first of the conditions of the bond which was broken by Mohamed, the administrator, was that contemplating his filing an inventory within a year of the grant of letters of administration, so that the first breach was on 19th January 1900, another breach was in 1903 when he had in his hands moneys of the estate which he could and should have distributed amongst the heirs, but did not do so. Consequently the suit of the plaintiff was long time barred when brought. The application of Art. 68 to administration bonds may be attended with results which the legislature could scarcely have contemplated, but in the absence of any special provision for such bonds remaining in force for as long as an administrator does not do his duty, the plain provision of the law as it stands must be applied to them. The appeal is allowed and the plaintiff's suit is dismissed with costs. She is also ordered to pay the appellants' costs of this appeal, one set only.

K.N./R.K. *Appeal allowed.*

A. I. R. 1914 Lower Burma 262

ORMOND, J.

Maung Maung — Defendant—Appellant.

v.

S. G. Firm—Plaintiff—Respondent.

Special Second Appeal No. 165 of 1912, Decided on 1st September 1913.

Transfer of Property Act (4 of 1882), S. 53—Land granted to debtor transferred with grantor's permission as required by grant—Nonsolvency of transferor—Absence of consideration—Presumption under S. 53 arises—Payment by volunteer to save attachment—Only personal cause of action against debtor arises.

A, who had a grant of land from the Collector with power to transfer the same with the Collector's permission conveyed it to his brother *B*, after having secured the Collector's consent, for no consideration and at a time when he was pecuniarily embarrassed. *C*, a decree-creditor of *A*, attached the land, ignoring the transfer to *B*. The attachment having been raised at *B*'s instance, *C* sued *B* for a declaration that he was entitled to attach the land:

Held: that, under the circumstances, the presumption under S. 53 was that the transfer was void as against *C*. [P 263 C 1]

B, who paid off a previous attaching creditor of *A*, claimed to stand in creditors shoes.

Held: that *B* had only a cause of action against *A* personally. [P 263 C 1, 2]

May Oung—for Appellant.

Doctor—for Respondent.

Judgment.—The plaintiff-respondent attached land under a decree obtained against one Maung Myaing. The defendant Maung Maung, who is a brother of Maung Myaing, obtained an order for the removal of the attachment. The plaintiff then sued for a declaration that he is entitled to attach the land. On 3rd March 1903 the Government made a grant of the land to Maung Myaing. Under that grant Maung Myaing was allowed three years' exemption of revenue (but he had to work the land) and he was to pay a fixed revenue for a subsequent five years. He was not allowed to transfer the land without the permission of the Deputy Commissioner. On 5th July 1907 Maung Myaing applied to the Deputy Commissioner for permission to transfer the land to his brother Maung Maung. On 2nd April 1908 the transfer was sanctioned and the land now stands in the name of the defendant Maung Maung. In March 1907, i. e., before Maung Myaing's application to the Deputy Commissioner, Maung Myaing was hopelessly involved in debt and for that rsason applied for the land to be transferred to his brother.

The plaintiff sued Maung Myaing on a promissory note dated March 1907, and got a decree in August 1909. Maung Myaing's right to transfer with the permission of the Deputy Commissioner was a valuable right. He exercised that right in favour of his brother and took no consideration from him. He did so at the time when he was unable to pay his debts, of which the plaintiff's claim was one. The presumption, therefore under S. 53, T. P. Act, is that the transfer is void as against the plaintiff. In November 1907, one Maung Daik sued Maung Myaing on a debt incurred before July 1907, and Maung Daik obtained a decree and attached the property as against Maung Myaing before the transfer to Maung Maung was made. Maung Maung paid off the amount of that attachment, and it is a contended for him that he stands in the shoes of Maung Daik and that a declaration should be made in this suit to that effect. That is a matter between Maung Maung and Maung Myaing. If he has paid off Maung Myaing's debt, he naturally has a cause of action against Maung Myaing if he did so under compulsion or on his behalf.

There will be a declaration therefore that the plaintiff is entitled to attach the land as if the grant to Maung Myaing was still subsisting, and the decree of the Divisional Court is modified to that extent. The appellant will have two gold mohurs costs for this appeal.

K.N./R.K. *Decree modified.*

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* A. I. R. 1914 Lower Burma 263

HARTNOLL, OFFG. C. J. AND ORMOND, J.

Po Mya—Appellant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 93 of 1913 and Criminal Appeal No 979 of 1913, Decided on 3rd February 1914.

*** Criminal P. C. (5 of 1898), Ss. 234 and 239—S. 234 requires that the several acts must form part of one transaction—Misjoinder is ground to set aside conviction—Prejudice to appellant is not necessary.**

To enable more persons than one to be charged and tried together for more offences than one the offences must all form part of the same transaction. [P 264 C 2]

When there is a misjoinder of charges, the convictions and sentences must be set aside and a retrial ordered in the case of the accused who appeals, whether he has been prejudiced by the misjoinder or not. [P 264 C 2]

Eggar—for the Crown.

Order of reference

Twomey, J.—The appellant, Nga Po Mya, was tried jointly at one trial with another accused, Tun Lin, for two distinct offences of house-breaking by night and theft under S. 457, I. P. C., the first offence having been committed at the house of one Maung Lwin on 30th August 1913, and the second at the house of one Maung Saung in another village on 30th September 1913.

The joint trial was, in my opinion, illegal. Under S. 233, Criminal P. C., the general rule is that there shall be a separate charge and a separate trial for every distinct offence. Ss. 234, 235, 236 and 239 state certain exceptions to this general rule. Ss 235 and 236 are clearly not applicable to the present case. S. 234 permits the trial of an accused person at one trial for three offences of the same kind committed within 12 months, but this section does not apply to the case

of two persons being tried together. The section which governs such a case is S. 239, and it is an essential condition for the joint trial of two or more persons under that section that the offences with which they are charged should have been committed in the same transaction. It is not sufficient for this purpose to show that they were afterwards in joint possession of the proceeds of the several offences with which they are charged.

It might be argued from the concluding part of S. 239 — "and the provisions contained in the former part of this Chapter shall apply to all such charges" —that S. 239 and S. 234 may be read together and that when two or more persons within the space of 12 months have been engaged jointly in more than one criminal transaction, they may be tried jointly at one trial for any number of the joint offences not exceeding three. It does not appear to me that this is the true meaning of the concluding part of S. 239 ; I think the words "the former part of the chapter" refer only to the part headed "Form of charges," S. 221 to 232 inclusive.

In view of the decision of the Privy Council in *Subramania Aiyer* v. *Emperor* (1) the question is one of great importance, for if the misjoinder is contrary to the provisions of the Code the convictions and sentences must be set aside and retrials must be ordered whether the accused persons have been prejudiced or not by the misjoinder. It is desirable that there should be an authoritative ruling on the matter.

I therefore refer to a Bench of this Court the question whether the joint trial of the two accused persons in this case for two distinct offences was contrary to the provisions of S. 239, Criminal P. C.

Opinion

Hartnoll, Offg. C. J.—I can see no reason for differing from the opinion expressed by Twomey, J. The meaning and applicability of S. 239, Criminal P. C., was considered by a Bench of the Calcutta High Court in the case of *Budhai Sheik* v. *Emperor* (2) and I am in accord with the reasoning of the learned Judges who decided it. To enable more persons than one to be charged and tried together for more offences than one, the offences must all form part of the same transaction. S. 233, Criminal P. C., lays down the general rule that there shall be a separate charge for each accused and that such charge shall be tried separately. The following sections lay down exceptions to the general rule. Ss. 234 to 238 apply to cases where one person may be dealt with at one trial for more than one offence. S. 239 applies to the trial of more persons than one jointly. The last words of S. 239 do not, in my opinion, mean that S. 239 and S. 234 are to be read together. I am of opinion that they only refer to Ss. 221 to 232 inclusive. The charges in the present case were not therefore authorized by law, as they relate to distinct offences not committed in the same transaction. It was urged that if this view be taken, a new trial need not necessarily be ordered. As I read the decision in the case of *Subramania Aiyer* v. *Emperor* (1), there must necessarily be a retrial in the case of Maung Po Mya, who has appealed. I notice however that Maung Tun Lin pleaded guilty and has not appealed and that his case was called for on revision by Twomey, J. Our revisional powers under S. 439, Criminal P. C., are discretionary and in the case of *Emperor* v. *Tha Byaw* (3), a Full Bench of this Court did not set aside a conviction where an accused pleaded guilty and had not personally applied for revision although there was a misjoinder of charges in his case. It will be open to the Assistant Government Advocate to bring this case to the notice of Twomey, J., when he finally deals with the case of Maung Tun Lin.

I would answer the question referred by saying that the joint trial of Maung Po Mya and Maung Tun Lin in this case for two distinct offences was contrary to the provisions of S. 239, Criminal P. C.

Ormond, J.—I concur.

K.N./R.K. *Reference answered.*

(1) [1902] 25 Mad. 61=28 I. A. 257=11 M. L. J. 233=3 Bom. L. R. 540=5 C. W. N. 866 =2 Weir 271 (P.C.)

(2) [1906] 33 Cal. 292=10 C. W. N. 32=3 Cr. L. J. 126.

(3) [1907-08] 4 L. B. R. 315=9 Cr. L. J. 15 (F.B.).

A. I. R. 1914 Lower Burma 265

HARTNOLL, OFFG. C. J. AND
TWOMEY, J.

Manackjee Pallanjee — Defendant — Appellant.

v.

S. A. Meyappa Chetty —Plaintiff —Respondent.

First Appeal No. 162 of 1911, Decided on 2nd March 1914.

Contract Act (9 of 1872), Ss. 172 and 173 —Bona fide incumbrancer without notice and in possession is preferred to prior incumbrancer — Burden of proof of notice is on person alleging.

A bona fide incumbrancer without notice who is in possession of moveable property is to be preferred to an incumbrancer whose security is of prior date. [P 265 C 1]

The person alleging notice must prove it. [P 265 C 2]

Bilimoria—for Appellant.

Clifton—for Respondent.

Twomey, J.—The parties to this appeal are rival mortgagees of a steam launch called "Mahomed." It was first mortgaged by registered document together with several other parcels of property, moveable and immovable, for Rs. 10,000 in 1901 to the respondent firm S. A., but was allowed to remain in possession of the mortgagor who continued to ply the launch in the delta. It was afterwards mortgaged by another registered document to the appellant, Manackjee Pallanjee, for Rs. 7,000 in 1904. Manackjee sued on his mortgage in 1906 and got a decree from the Chief Court in June of that year. The Official Receiver was appointed receiver and took possession of the launch, and an order for sale was passed on 25th October 1906 as the time allowed for payment had expired. The launch was subsequently sold and the sale-proceeds are in deposit in the Court.

The respondent firm filed their suit in the Pyapon District Court on 3rd November 1906. They joined Manackjee as co-defendant with the mortgagors, alleging that when he took his mortgage in 1904 he was aware of the prior mortgage of 1901. The District Court has decided this point in favour of the respondent firm and the only question which it is necessary to decide in this appeal is the question of notice.

It is settled law that a bona fide incumbrancer without notice who is in possession of moveable property is to be preferred to an incumbrancer whose security is of prior date, and in this case it is not disputed that the appellant obtained possession of the launch through the Court and is now through the Court in possession of the sale-proceeds. If Manackjee had notice of the S. A. firm's earlier incumbrance, the latter is entitled to priority and not otherwise.

The burden of proof was on the plaintiff-respondent. The direct evidence consists of the statements of Arunachellem, the Manager of the S. A. firm at Pyapon, at the time of the mortgage to the firm and for some years later. Arunachellem's evidence is in the words of the District Judge "somewhat corroborated" by the evidence of Mutiya, a Chetty clerk of Arunachellem. Arunachellem says that he went to Wakema in 1901 and 1903 and met Manackjee, and in the course of conversation with him Manackjee asked if Syed Abdulla, the owner of the launch, had borrowed money from the S. A. firm. Arunachellem thereupon told him of the Rs. 10,000 mortgage, which included the launch "Mahomed." When he gave his evidence on 15th May 1911 Arunachellem mentioned "Mutiya" as being present at the conversation with Manackjee, but he said that Mutiya was away in Madras. The hearing was adjourned to 26th May 1911 for the issue of a commission on behalf of Manackjee and on 26th May 1911 Mutiya appeared as a witness. This man's evidence shows that he was not in Madras on 15th May. He said that he returned to Rangoon on the 17th or 18th May and I gather from his evidence that he was at Pyapon on or about 15th May and might have been cited as a witness then. At any rate it must be said that Mutiya's admissions in cross-examination show Arunachellem's statement as to Mutiya's absence in Madras to be very disingenuous. Moreover, Mutiya's evidence as to the conversation between Arunachellem and Manackjee is extremely vague. He says it took place in 1901, 1902 or 1903. Others were present, but he does not remember who. (Arunachellem did not say that any others were present.) It is not clear why Manackjee should make inquiries about Syed Abdulla's borrowings in 1901, 1902 or 1903, for it was not till 1904 that Manackjee advanced his money to Abdulla. I think it would be unsafe to accept the evidence of the Manager Arunachellem and his clerk Mutiya as to this alleged conversa-

tion. It is also improbable that Manackjee would have advanced such a large sum if he knew the launch was already hypothecated to the Chetty firm. The District Judge's remarks on this point do not seem to me to carry much weight.

When the respondent firm's lawyers wrote to Manackjee in August 1906 (after Manackjee had obtained his decree), they made no allegation as to Manackjee's knowledge of the prior mortgage. They wrote informing him of it and asking whether Manackjee denied their clients' claim. They said nothing about Arunachellem's alleged conversation with Manackjee in 1901, 1902 or 1903.

It is a weak point in the appellant's case that he did not go into the witness-box and submit himself to cross-examination. He is said to have been absent in India at the time of the hearing, but there is no proof of this on the record. As however the burden of proof was on the respondent firm, I think it was for them to show beyond reasonable doubt that Manackjee had notice of the prior mortgage. In my opinion the evidence produced by the respondent firm was insufficient to establish this allegation and, moreover, I think it is contrary to the probabilities of the case.

I would therefore reverse the decree of the District Court as regards the appellant Manackjee Pallanjee and dismiss the plaintiff firm's suit as against him with costs in both Courts.

Hartnoll, Offg. C. J.—I concur.

K.N./R.K. *Decree reversed.*

A.I.R. 1914 Lower Burma 266

TWOMEY, J.

Pwa Me—Applicant.

v.

San Hla—Opposite Party.

Criminal Revn. No. 376-B of 1913, Decided on 30th January, 1914.

Criminal P. C. (5 of 1898), S. 488—Marriage must be proved to get order of maintenance.

Under S. 488, Criminal P. C., a woman cannot be granted a maintenance order against a man unless she proves hereself to be his legal wife according to his personal law. [P 266 C 2]

Wiltshire—for Applicant.

Dawson—for Opposite Party.

Judgment.—In this maintenance case under S. 488, Criminal P. C., the applicant Ma Pwa Me is a Burmese Buddhist and the respondent San Hla alias Leong Foke Shu is the son of a Chinese father by a Shan mother. The parties are proved to have cohabited for six or seven years and to have had two children, one of whom is living, but there was no marriage ceremony of any kind. The Magistrate has found that even if they were both Burmese Buddhists, the circumstances do not give rise to a presumption that there was a legal marriage. He has found further that the respondent, San Hla, was not a Burmese Buddhist and that there was no marriage according to the Chinese Customary law applicable to the respondent.

As regards the latter finding, it is clear that a maintenance order could not be granted against the respondent unless it was proved that the applicant was his legal wife according to his own personal law. An attempt was made to prove that San Hla was converted to the Burmese form of Buddhism, but the evidence is not sufficient. He paid reverence to pongyis and listened to their sermons, and when one of his children died he took part in ceremonies which are usually performed by Burmese Buddhists. He also became a member of a society for promoting Buddhism, but it is admitted that several other Chinese belong to this society without abandoning their own special form of worship. One witness states that when San Hla was a boy he was Shinpyu'd during the April holidays. But this is denied by his father and the allegation cannot be regarded as proved. The respondent produced several witnesses who state that he has always followed Chinese forms of worship. I agree with the following remarks of Parlett, J. in *Maung Tun Tha* alias *Wong Kin* v. *Ma Pu* (1): "The grounds on which the Magistrate considered applicant a Burmese Buddhist are that he is commonly known by a Burmese name; that he worships at pagodas, pays reverence to Buddhist monks and keeps fast days at Buddhist monasteries and that he built a Buddhist monastery and dedicated it according to the ritual observed by Burmese Buddhists in such cases. It is a matter of common knowledge and experience that Chinamen long resident or born in this country adopt a Burmese name. As regards the other points, they indicate that he is a Buddhist, as he admits he is, but there is nothing to show that the

(1) [1910] 8 I. C. 452.

practices he followed differ from those followed by all Chinese Buddhists, whether in Burma or elsewhere, much less that they are the peculiar characteristics of Burmese Buddhists." I think the Magistrate was right in deciding against San Hla's alleged conversion to the Burmese form of Buddhism. Even if this conversion had been proved, I doubt whether it would follow that San Hla should be held amenable to the customs by which the marriages of Burmese Buddhists are regulated. But as I find that San Hla is a Chinese Buddhist, it is clear that the validity of the marriage alleged in this case must depend on the Customary law applicable to Chinese Buddhists. It is admitted that there was not even the semblance of a marriage according to Chinese custom. It is not alleged that any of the preliminary steps enumerated in Parker's work on Chinese family law were fulfilled.

As I find that the respondent is a Chinese Buddhist and that there was no marriage according to Chinese Customary law, it is not necessary to deal with the further question whether the relationship of the parties would have amounted to a legal marriage if they had both been Burmese Buddhists.

The application is dismissed.

K.N./R.K. *Application dismissed.*

A. I. R. 1914 Lower Burma 267

HARTNOLL, OFFG. C. J. AND TWOMEY, J.

Palaneppa Chetty and *others*—Plaintiffs—Appellants.

v.

M.S. Somasundaram Chetty and *others*—Defendants—Respondents.

First Appeal No. 157 of 1913, Decided on 10th December 1913.

Civil P. C. (5 of 1908), S. 47 and O. 21, R. 2—Payment not certified—Suit for declaration that decree is satisfied is barred by S. 47.

A suit for a declaration that a particular decree has been satisfied by payment out of Court and can no longer be executed, is barred by the provisions of S. 47, Civil P. C.: (1893-1900) *L. B. R.* 621, *Dist.* [P 263 C 1]

N. S. Aiyar—for Appellants.

Hartnoll, Offg. C. J. — Plaintiffs-appellants sue respondents under the following circumstances: They state that they and respondents 3 and 4 are partners in the firm of P. L. P. carrying on business at Pegu, that on 29th September 1911 the firm of V. E. N. K. R. M. A. (respondent 2) obtained a decree for Rs. 8,890-2-5 against the P. L. P. firm in a suit filed in the Ramnad Court at Madura, that the decree was subsequently adjusted by a payment of Rupees 6,600 in consequence of an arrangement made between M. A. R. R. M. Annamalai Chetti, respondent 3, and the V. E. N. K. R. M. A. partners, the payment being made by respondent 1 as agent of the M. A. R. R. M. firm to the V. E. N. K. R. M. A. firm on 31st January 1912, that respondent 3 has repaid the Rs. 6,600 to the M. A. R. R. M. firm out of moneys belonging to the P. L P. firm, that the V. E. N. K. R. M. A. firm has not certified the adjustment of the decree passed at Ramnad to that Court, that as the result of misunderstandings between appellants and respondents 3 and 4, respondent 3, in collusion with the V. E. N. K. R. M. A. firm and M. A. R. R. M. Annamalai Chetty, got the Ramnad decree fraudulently transferred by the V. E. N. K.R M.A. firm to respondent 1, the agent of the M.A.R R.M. firm, and that respondent 1 applied to the Ramnad Court to be recognized as the assignee of the decree and for a transfer to the Pegu District Court, and is now proceeding with the execution in the latter Court. The appellants pray for a declaration that the decree passed in the Ramnad Court has been satisfied and can no longer be executed. The District Court rejected the plaint and so this appeal has been laid. O. 21, R. 2, deals with payments out of Court in satisfaction of a decree.

It lays on decree-holders the obligation of certifying such payments to the Court and allows the judgment-debtor to apply for the recording as certified of such payments. The rule then lays down that such a payment which has not been certified or recorded as certified shall not be recognized by any Court executing the decree. S. 47 of the Code says: "All questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit." The present suit most certainly deals with a matter relating to the satisfaction of the Ramnad decree, for the appellants rely on an alleged uncertified

payment of Rs. 6,600, which they say satisfied it. The relief asked for is a declaration that the decree has been satisfied and can no longer be executed. This relief is one that comes directly within the terms of S. 47, which expressly enacts that it must not be determined by separate suit but in the execution proceedings.

The law has been discussed in many cases and the view I hold has been followed in the following cases: *Azizan* v. *Matuk Lal Sahu* (1), *Laldas Narandas* v. *Kishordas Devidas* (2), *Bairagulu* v. *Bapanna* (3). In the case of *Mg. Myaung* v. *Mg. Shwe Hmon* (4) it was held that the proper remedy in a case like this was by a separate suit for damages and the decision does not conflict with the Calcutta case quoted above. This is not a suit for damages but one to restrain the decree from being executed.

It was then urged that in any case the plaint should not have been rejected. There was in my opinion no other course open to the Judge. The suit was barred by S. 47, Civil P. C.

I would dismiss the appeal.

Twomey, J.—I concur.

K.N./R.K. *Appeal dismissed.*

(1) [1894] 21 Cal. 437.
(2) [1898] 22 Bom. 463.
(3) [1892] 15 Mad. 302=2 M. L. J. 112.
(4) [1893-1900] L. B. R. 621.

A. I. R. 1914 Lower Burma 268

TWOMEY, J.

Hla Dun and *others*—Plaintiffs—Appellants.

v.

M. L. R. M. Chetty Firm and *others*—Defendants—Respondents.

Second Appeal No. 100 of 1913, Decided on 17th July 1914.

Lower Burma Land and Revenue Act (2 of 1876), Ss. 55 and 56—Claim to ownership of crops is distinguished from claim to use and occupation of land—Civil Court has jurisdiction to decide objection to attachment of crops—Incidental enquiry into possession of land for determining ownership of crop does not oust civil Court's jurisdiction.

A claim to the ownership of crops is not the same thing as a claim to the use or enjoyment of the land on which the crops are grown. It is a claim to the use or enjoyment of something yielded by the land. The civil Courts have jurisdiction to determine claims and objections in respect of the attachments of standing crops. [P 269 C 1]

When a civil Court inquires as to possession of land incidentally and collaterally and only for the purpose of deciding who is entitled to the crop standing on the land, it does not exercise any jurisdiction as to the use or enjoyment of the land within the meaning of S. 56, Lower Burma Land and Revenue Act. [P 269 C 2]

Clifton—for Appellants.

Chari and *Mya Bu*—for Respondents.

Judgment.—The plaintiff-appellant, Maung Pu, sued for a declaration of title to the paddy crop reaped on certain land which he worked in the rains of 1911. Defendant respondent 4, Maung Ba Cho, was in possession of the land the previous season, but as he failed to pay the land revenue for that agricultural year, the land (in respect of which landholder's rights had not been attained) was resumed by Government, and the village headman afterwards allotted it for cultivation to Maung Pu in May. Maung Pu's case is that he thereupon ploughed the land and sowed paddy broadcast and that the crop belonged to him. But after the land had been resumed, Ba Cho went and paid up the revenue arrears and the order of resumption was withdrawn by the Deputy Commissioner, who was apparently not aware that the land had in the meantime been allotted to a fresh occupier, Maung Pu. Ba Cho went to the land and built a hut on it during the rains and claims to have ploughed it and sown paddy after Maung Pu's ploughing. In the course of the rainy season of 1911 defendant-respondent 1, a Chetty firm, in one case and defendants-respondents 2 and 3 in another case obtained money decrees against Ba Cho, and when the crop on the land came to maturity, these decree-holders attached the crop in execution as if it belonged to Ba Cho. The crop was harvested and sold under the orders of the civil Court and the sale proceeds are now in deposit.

In the Subdivisional Court Maung Pu's suit for a declaration of title was unsuccessful. Maung Pu and Ba Cho each produced evidence as to the working of the land in the 1911 rain's. The Subdivisional Judge appears to have based his decision less on the evidence as to ploughing and sowing than on the fact, which he held proved, that "Ba Cho is the owner of the land in question or is entitled to possession."

Maung Pu appealed to the Divisional Court where it was held that though Maung Pu had ploughed the land and sown the crop, the civil Courts are de-

barred from granting him a declaratory decree because of the provisions of the Land and Revenue Act excluding the jurisdiction of the civil Courts. The learned Judge held that "a claim to the title of paddy produced on such land (i.e. land in respect of which landholder's rights have not been attained) is a claim to the use and enjoyment of the land" as contemplated in S. 55 (b), Land and Revenue Act. The Judge goes on to say:

"Were I to decide to the contrary effect, it would mean that I decided that, although Ba Cho was allowed to pay the revenue for the land for 1910-11 and therefore according to ordinary usage recognized as the possessor as against other individuals by the Deputy Commissioner, Maung Pu should be recognized as the possessor for 1911-12."

I am unable to concur in these views. A claim to the ownership of crops is not the same thing as a claim to the use or enjoyment of the land on which the crops are grown. It is a claim to the use or enjoyment of something yielded by the land. If the use or enjoyment of the land includes the use or enjoyment of what the land yields, then the jurisdiction of the civil Courts would be ousted even when the crop has been harvested and the grain transported to another locality, and such a result would be manifestly absurd. It might be argued that the jurisdiction of the civil Court is ousted at any rate as long as the crops are standing. But in my opinion even this would involve an unjustifiable extension of the words "use or enjoyment of such land" in S. 55. For "standing crops" are moveable property under the Civil Procedure Code, and are liable to attachment under S. 60. The person who grows the crop may be a mere licensee with no permanent, heritable and transferable rights of use or occupancy and the land is in that case not liable to attachment under S. 60. But he has complete disposing power over the crop which he has grown, and may exercise this power even before the crop is reaped. The standing crop being liable to attachment by the civil Courts in execution, I think it follows of necessity that the civil Courts may exercise their ordinary powers of determining claims and objections in respect of the attachment. It is objected by counsel for the respondents that a suit for a declaration of title to crops may involve, as this does, an inquiry is to who was in lawful possession of the land when the crop was planted or sown, and that the civil Courts are prohibited from making such an inquiry by S. 56, Land and Revenue Act. But S. 56 merely lays down that no civil Court shall "exercise jurisdiction as to (inter alia) disputes as to the use or enjoyment of such lands." A Court does not exercise jurisdiction in such a dispute by inquiring as to possession incidentally and collaterally and only for the purpose of deciding who is entitled to the crop. To exercise jurisdiction in a dispute means to adjudicate and determine it. The civil Court may have to form an opinion as to who was in lawful possession of the land as a relevant fact in determining the rightful ownership of the crop, but that is not exercising jurisdiction in respect of disputed possession.

Turning to the evidence in this case, I think there can be no doubt that Maung Pu was in lawful possession under the permission given to him by the village headman, and that the land was ploughed and the crop sown by Maung Pu, as indeed the Divisional Judge has found. It was not till 20th June that the orders for resumption of the land were cancelled and Maung Pu had then been in possession under the village headman's permit for a month. During that time he worked the land with four pairs of bullocks and four labourers. There is no reason to distrust the evidence of the neighbouring cultivators, Ko Maung and Tun E, on this point, and it is corroborated by the evidence of Maung Pu's coolies, one of whom is related to Ba Cho. Ba Cho's witnesses Tun Aung and Tun Baw are related to him; Parayachi is an inaccurate witness who is unable to say definitely whether Ba Cho ploughed or sowed; Ko Tun gives definite evidence in favour of Ba Cho, but his cross-examination shows that he is at enmity with Maung Pu's father-in-law. The probabilities and the weight of evidence are both in favour of Maung Pu. I therefore set aside the decrees of the lower Courts and grant a decree to the plaintiff as prayed with costs against the defendants-respondents in all Courts. The advocate's fee in this Court is fixed at 5 gold mohurs.

K.N./R.K. *Decrees set aside.*

A. I. R. 1914 Lower Burma 270

HARTNOLL, OFFG. C.J. AND ORMOND, J.

In re *Jannat Ally*—Appellant.

Civil Misc. Appeal No. 205 of 1913, Decided on 16th February 1914.

Executor—Appointment—Making elder son trustee if testator dies during minority of other minor son is not sufficient to infer that he is appointed executor.

The mere fact that a testator has appointed by will his elder son to be trustee of his minor younger son and directed him to deal with a certain house as the trustee of the minor in the event of the testator's death during the younger sons' minority is not sufficient to indicate that the elder son was appointed the executor of his will. [P 270 C 2]

Auzam—for Appellant.

Hartnoll, Offg. C. J.—The point for decision is whether appellant was appointed executor by implication of the will of Mohamed Ally deceased. The will is to the following effect :

"I write this will voluntarily and with sense and consciousness (to the effect) that my one house is at Rangoon in No. 46 Street and the house is No. 66 ; that after my death, son Jannat Ally's share is one-half and son Hassan Ally's share is one-half in that house. The age of son Hassan Ally is twelve years at present and if after my death, this son Hassan Ally has not reached the age of twenty-one years, I appoint son Jannat Ally as his "trustee." On deducting every expense from the rent of this house, son Jannat Ally shall pay to him —son Hassan Ally—the moneys in respect of his half-share out of the balance moneys for rent and this son Hassan Ally shall live where he likes and when his marriage would take place, son Jannat Ally shall, after selling this house, spend his share of the moneys in his wedding expenses and if there is a surplus, son Jannat Ally shall pay it up to him on his reaching the age of twenty-one years. Son Hassan Ally's marriage should be performed after his reaching the age of eighteen years. If in case the sale of this house appear advantageous to son Jannat Ally before the marriage of son Hassan Ally has taken place, he can sell this house and shall invest his—son Hassan Ally's—half-share of the moneys on interest at a good place and shall pay whatever is accrued out of this sum for board, education, etc., of son Hassan Ally. But if the money realized out of this sum be less than Rs. 20 (twenty) each month, he should pay out of the principal sum, as long as his marriage has not been performed, son Hassan Ally should not get less than Rs. 20 (twenty).

"In addition to this house, I may during my life give to any one in charity, gift, whatever the cost, immovable property, shares etc., I may have got and after paying for whatever expenses I may have asked to incur after my death, one-half share of whatever is left is of son Jannat Ally and one-half share is of son Hassan Ally.

"Whatever moneys, property, etc., that son Jannat Ally may have got are of his own earnings, to which neither I nor Hassan Ally has a right."

I can see no reason to differ from the conclusion arrived at by the learned Judge on the original side. It is clear that by the terms of the will appellant, Jannat Ally, was appointed to be trustee of his brother Hassan Ally with respect to a house described as No. 66 in 46th Street in the event of the testator dying before Hassan Ally attained the age of twenty-one years, and the will contains detailed instructions as to how Jannat Ally was to deal with the house in such a case ; but the will gives no sufficient indication that Jannat Ally is appointed to generally execute the will. He is given by the will half of the property left by his father exclusive of such as may be given away and Hassan Ally is given the other half : but nothing is said as to who is to pay the debts, funeral expenses, etc., and to collect the assets. If the testator had died after Hassan Ally had attained the age of majority, could it be said that the will appoints an executor ? The case *In the goods of Punchard* (1) may be usefully considered in coming to a conclusion in the present one. Also the present case is not dissimilar to that of *Seshamma* v. *Chennappa* (2), where the will provided that the plaintiffs should take care of the estate during the minority of a son who was to be adopted to the testator and imposed upon them the duty of providing for the maintenance of the persons therein named, and in which it was held that

(1) [1872] L. R. 2 P. 369=41 L. J. P. 25 = 26 L. T. 526=20 W. R. 446.
(2) [1897] 20 Mad. 467.

the plaintiffs were not appointed executors by implication.

There is to my mind no sufficient indication that the testator meant to confide the execution of his will to Jannat Ally other than that he directed him to deal with a certain house as the trustee of a minor son in the event of the testator's death during such minority.

I would therefore dismiss this appeal.

Ormond, J.—I concur.

K.N.R.K. *Appeal dismissed.*

A. I. R. 1914 Lower Burma 271

TWOMEY, J.

Po Kin—Defendant—Appellant.

v.

Maung Kala—Plaintiff—Respondent.

Civil Revn. No. 108 of 1912, Decided on 27th January 1914.

Master and Servant—Misconduct is good cause for dismissal.

Misconduct inconsistent with the due and faithful discharge by a servant of the duties for which he was engaged is a good cause for his dismissal. [P 271 C 2]

Hay—for Applicant.

Palit—for Respondent.

Judgment.—The plaintiff-respondent, Maung Kala, was engaged by the defendant-applicant, Maung Po Kin, as a field labourer to work for the season for 60 baskets of paddy to be paid at harvest. When Maung Kala had performed about two-thirds of the work, he was turned out of his employer's house as he was caught in an intrigue with his employer's daughter. Maung Kala sued for his wages and Po Kin in his written statement set up only one defence, namely, that Maung Kala had left the work of his own accord. The Township Court found as a matter of fact that Maung Kala was not dismissed by his employer, Po Kin, but left of his own accord and the suit was dismissed on this ground. There can be no doubt, however that Maung Kala was turned out by his uncle at the request of Po Kin's wife, Ma Paw. Maung Po Kin himself was away from home at the time and in requesting Maung Kala's uncle to turn him out, Ma Paw was acting as her husband's agent. When Po Kin returned he appears to have approved of Maung Kala's dismissal, took no steps to reinstate him and engaged another man to complete the work.

Maung Kala appealed to the District Court. The District Judge appears to have misread the evidence for the defendant. Maung Po Kin made no admission that he complained to Maung Kala's uncle. But the learned Judge was right in finding that Maung Kala was really turned out by Ma Paw, who was angry with him on discovering the intrigue with her daughter. As stated above, Maung Po Kin was bound by his wife's action in the matter. On this ground the District Judge dissented from the Township Court's decision and decreed the plaintiff's suit. The learned Judge failed however to consider the question whether the dismissal was justified. It is true that this defence was not raised in the written statement and no direct issue was framed as to justification. But it has not been urged before me and it cannot be held that the defendant is in this account debarred from relying on the defence of justification. He no doubt acted in good faith in setting up the defence that he did not actually dismiss Maung Kala, for the actual ejection of Maung Kala from the house was effected by Maung Hmat Kyauk. Maung Po Kin may very well have thought that this defence would hold good and that it was unnecessary for him to publish the facts about his daughter's intrigue with Maung Kala. The Township Court having learnt from the examination of the parties that the plaintiff's uncle, Ko Hmat Kyauk, had come and turned him out of Po Kin's house at the instance of Po Kin's wife, might well have questioned the parties further as to the explanation of this incident, and the Judge would then have perceived the importance of framing an issue as to the justification. The facts as to the intrigue between Maung Kala and Po Kin's daughter are not disputed, and it cannot be said that the plaintiff-respondent was prejudiced by the absence of a definite issue on the legal question of justification. It is an established rule of English law that misconduct inconsistent with the due and faithful discharge by a servant of the duties for which he was engaged is good cause for his dismissal. This rule is in accordance with justice, equity and good conscience and may therefore be adopted in the absence of any specific Indian enactment inconsistent with the rule.

A field labourer in this country usually lives in his employer's house almost on

the footing of one of the family and it appears that Maung Kala was living in this way in Po Kin's house ever before he was engaged for field work. Such an arrangement enables the employer to keep close supervision over his labourer. Maung Kala grossly abused his employer's hospitality by seducing his daughter. A petty cultivator like Po Kin has to live in close personal relations with his one or two hired men and it would be highly unreasonable to expect him to continue such relations with the man who had brought shame to his household.

I therefore hold that the plaintiff-respondent's misconduct was inconsistent with the due discharge of his duties and that his dismissal was justified. As the dismissal took place before Maung Kala had completed his work and earned the stipulated wages for the season, he was not entitled to any remuneration for the broken period.

The decree of the lower appellate Court is set aside and the plaintiff's suit is dismissed with costs in all Courts.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Lower Burma 272

PARLETT, J.

British India Steam Navigation Co. Ltd. and *others* — Defendants — Appellants.

v.

M. N. Fakir Mahomed and *another*— Plaintiffs—Respondents.

Civil Revn. No. 138 of 1912, Decided on 4th December 1913.

Penal Code (4 of 1860), S. 193—Pleadings wilfully false amount to offence.

Pleadings are statements required by law to be true; and therefore a wilful falsification is punishable by the criminal law. [P 273 C 1]

Hartnoll—for Appellants.

Bilimoria and *Giles*—for Respondents.

Jndgment.—The original plaint sets out in para. 1 that 15 casks of oil were shipped by plaintiffs' agents in good order and condition in the British India Steam Navigation Company's steamer "Tara," of which 14 casks were delivered in good order and condition and one, being tendered practically empty and damaged, was refused. The British India Steam Navigation Company's first written statement admits that the 15 casks were shipped in good order and condition, alleges that they were all landed in good order and condition at one of the Port Commissioners' jetties and that the damage to the cask occurred after it had been so landed, and pleads that they are not liable for damage which may have subsequently occurred. Later on they obtained leave to file an amended written statement in which they say that, though shipped in good order and condition, 5 of the 15 casks were certified on landing as leaking by the Port Commissioners and that under the endorsement on the bill of lading the company is not liable for damage by ordinary leakage.

It is admitted that an auger hole had been bored in the cask through which the contents were abstracted, but the written statement contains no allegation as to when that hole was bored. The plaint was eventually amended so as to join the Port Commissioners as defendants. In their written statement the latter pleaded inter alia that the cask was landed in a damaged and leaky condition and that no damage occurred to it while it was in their custody. The Superintendent of the Wharf gave evidence that on landing the five casks, which were old, were leaking through the joints; the one referred to in this suit was at the time less than half full. The auger-hole was not noticed, but the cask does not appear to have been closely examined and as the hole is only one-quarter of an inch in diameter, it might easily have escaped notice unless on close scrutiny. The British India Steam Navigation Company's witness states that he examined the cask on landing, that it was one of about a dozen which were leaking, but though especially examined for breakage, none was found and the auger-hole was not in it. This witness has been disbelieved and damages have been decreed against the company. It is now urged that it was for plaintiffs to prove their case and that, unless they did so which it is claimed they did not, a decree could not be given in their favour although the defence was disbelieved. It is clear however that the damage occurred when the cask was in the custody of one or other of the defendants. The question as to which of them was liable was one to be determined as between the defendants. I am unable to agree that the lower Court had not the materials for its determination.

The Port Commissioners' written statement clearly alleges that no damage occurred to the cask while it was in their custody, and this has never been challenged save by discredited evidence. The Wharf Superintendent's evidence, so far from showing that there was no hole in the cask when landed, strongly supports the contrary; for it is admitted that whether leaking through the joints or not, the bulk of the oil was abstracted through the auger-hole, and the evidence is that more than half the oil was gone when the cask was landed. Next it is argued that the endorsement on the bill of lading raises the presumption that this cask was shipped already leaking.

The written statements and the bill of lading show it to have been shipped in good order and condition : a leaking cask cannot be said to be in good order and condition. The bill of lading says the 15 casks were shipped in good order and condition and the endorsement runs : "Casks old. Not responsible for leakage or breakage and for leakage from plugged holes or otherwise." The company's witness indeed does not shrink from suggesting that even with a hole bored in it, the cask is still in good order and condition in the terms of the bill of lading. The meaning of the whole is however in my opinion clear; the casks, though old, were when shipped not leaking, but in view of their age, the company disclaimed responsibility for leakage, etc., which might occur in transit.

The company explicitly pleaded that all 15 casks were landed in good order and condition. It is now suggested that this was "a formal plea to put the burden on the plaintiffs." No such excuse can be accepted for reckless disregard of facts; pleadings, so far from being mere formalities, are statements required by law to be true, the wilful falsification of which is punishable by the criminal law. The plea was verified by a representative of the company as true to his own knowledge, and he swears that he had personally examined all the casks. Finally it is argued that the company should not have to pay the Port Commissioners' costs. It is obvious however that the latter were joined as defendants in consequence of the company's plea throwing the liability on to them.

I decline to interfere with that order. The application is dismissed with costs, two gold mohurs to each respondent.

K.N./R.K. *Application dismissed.*

A. I. R. 1914 Lower Burma 273

HARTNOLL, OFFG. C. J. AND YOUNG, J.

A. K. A. S. Jamal—Appellant.

v.

Moola Dawood Sons & Co.—Respondent.

First Appeal No. 22 of 1913, Decided on 24th July 1913.

Contract Act (9 of 1872), S. 107—S. 107 is not mandatory—Seller can postpone resale though notice given—If any benefit is obtained by postponement credit must be given to buyer.

The words of S. 107, Contract Act, are permissive and not compulsory. Therefore a seller of goods, who gives notice of his intention to resell the goods in pursuance of the provisions of S. 107, is not bound to carry out such intention and can change his mind if he likes.

If on the date of the breach of a contract to buy goods the price of goods is lower than at a later date when the seller sells them and realizes a higher price, he is bound in claiming damages from the buyer to account for the higher price obtained by him. [P 275 C 1]

Giles—for Appellant.

N. M. Cowasjee—for Respondent.

Hartnoll, Offg. C. J.—In this suit appellant sued to recover from the respondents Rs. 1,09,218-12-0 compensation for breach of contract. His case was that by six contracts between April and August 1911 he contracted to sell 23,500 shares in the British Burma Petroleum Lompany at certain rates per share, which were set out, and for delivery on or before 30th and 31st December 1911. The market price on 30th December was Rs. 4-3-0, a price that was very much less than the prices contracted for. The shares were tendered to respondents, but not taken delivery of or paid for. Appellant therefore sued to recover Rs. 1,09,218-12-0, the difference calculated on the amount due taking the contract prices and the market value of the shares on 30th December calculated at Rs. 4-3-0 a share.

The appellant sold 100 of the shares on 28th February 1912 at Rs. 4-3-0 and the rest of the 23,500 on dates between April and October 1912 at prices higher than Rs. 4-3-0 but lower than the contract prices arranged between him and respondents except in one instance.

In this way appellant realized for the shares Rs. 1,04,261-10-9. At contract prices appellant should have received

Rs. 1,84,125-10-0. The difference is Rs. 79,862-15-3 and this is the sum for which a decree has been given him by the learned Judge on the original side. Appellant lays this appeal claiming a further sum of Rs. 29,355-14-9, the difference between the amount claimed and the sum awarded.

On 30th December 1911, when appellant tendered the shares to respondents his advocates wrote: "Failing compliance with this request by to-day our client will be forced to sell the said shares by public auction on or about the 2nd proximo and you will be held responsible for all losses sustained thereby." On 2nd January 1912 he again through his advocates expressed the intention of reselling the shares and instituting a suit against respondents for the recovery of any loss which might result from that course. On 4th January he reiterated his intention to do so. Nothing was then done till the 26th February 1912 when appellant's advocate wrote to respondents and claimed Rs. 1,09,219-6-0, the amount arrived at by deducting Rs. 74,906-4-0, the value of the 23,500 shares at Rs. 4-3-0 a share, from Rs. 1,84,125-10-0, the agreed price of the shares. In assessing the damages the learned Judge on the original side has given respondents the benefit of the higher prices realized by appellant when he sold the shares. His reasons for doing so were as follows :

"One of the "rules" on back of the contract notes states that in default of payment for the shares on the date of settlement or by noon on the day following, the seller shall have the option of reselling the shares by auction at the exchange at the next meeting, and any loss arising shall be recoverable from the buyer. The plaintiff had no other right of resale beyond that. At the time that he first gave notice of his intention to resell he still had that right, but he subsequently failed to exercise it, i. e., though he has sold these shares at a higher rate than the rate of the due date, he did not purport to resell them as against the defendant. Can then the the defendant firm claim to have the benefit of the higher prices realized by the plaintiff ? I think they can. If a seller having the right of resale elects to exercise such right, he must give notice of his intention to resell, and having done so he has made his election between the two measures of damages that were opened to him. After giving such notice, it is his duty to resell either at the time (if any) appointed by the contract or within a reasonable time after the date of the breach. If he delays he takes upon himself all risks arising from further depreciation. And if he sells at a higher rate, such sale will be taken to be a resale in pursuance of his notice ; for otherwise he would be allowed to benefit by his own wrong." The grounds of appeal are:

"1. For that the learned Judge on the original side erred in law in holding that appellant having expressed an intention to resell the shares but not having sold the same in pursuance of such expression of intention, was precluded from recovery as damages the difference between the contract prices and the market rate at the time of the breach.

"2. For that the learned Judge on the original side erred in law and in fact in holding that the appellant had exercised a binding election to resell the shares.

"3. For that the learned Judge on the original side erred in law in holding that the sales in fact made by the appellant should be taken to be resales in pursuance of his notice to resell.

"4. For that the learned Judge should have awarded as damages the difference between tha contract prices and the market rate at the time of the breach, namely Rs. 1,09,218-12-0, instead of the sum of Rs. 79,862-15-3.

"5. In the alternative that if the said expression of intention to re sell amounted to a binding election, the learned Judge should have awarded as damages the difference between the contract prices and the market rate at the time when the shares should have been resold.

"6 That the decision of the learned Judge in awarding the sum of Rupees 79,862-15-3 only as damages was otherwise wrong in law and in fact."

There is no doubt as to what appellant's true measure of damages is. It is the difference between the contract prices and the market price when the contracts ought to have been completed – that is, in this case the date of the breach, 30th December 1911—for the appellant could then have taken the shares into

the market and obtained the current price for them. This was the principle followed in the case of *Pott* v. *Flather* (1). But it was argued that as in the beginning appellant chose to proceed under S. 107, Contract Act, he should be kept to such choice. It is clear that though at first he expressed the intention of pursuing the course set out in S. 107 he did not keep to his intention, for, when he brought his suit, he had only sold 100 shares, and this was on 28th February and he sued for his whole measure of damages. Appellant's counsel urged that, though appellant at first expressed the intention of following the course laid down by S. 107, he was not bound to carry out such intention and could change his mind if he liked. This view appears to be correct. The words of S. 107 are permissive and not compulsory. In the case of *Buldeo Doss* v. *Howe* (2) the view was taken that S. 107 does not deprive an unpaid vendor of goods of any other remedy he may have. I am therefore unable to agree with the views expressed by the learned Judge on the original side as to appellant being bound to proceed under S. 107.

But I think that there is abundant authority for holding that the respondents are entitled to the benefit of the higher prices realized by appellant in mitigation of the sum payable by them as damages. The subject is dealt with at pp. 771 and 772 of Leake on Contracts, Edn. 6, and p. 207 of Mayne on Damages, Edn. 8.

I would especially refer to the following cases : In *Oldershaw* v. *Holt* (3), where the plaintiff claimed as damages certain moneys from the defendant owing to his failing to carry out certain terms of a building lease and where plaintiff entered into a new agreement with another tenant, the jury were directed to have regard to the new and ultimately more advantageous agreement entered into in calculating the amount of damages due. In *Smith* v. *M'Guire* (4), which was a suit to recover damages for failure to carry out the terms of a charter party, that is, to load a ship with a cargo of oats, Martin, B., said : "It may be doubtful whether a party who breaks a contract has a right to say: "I will not pay you the damages arising from my breach of contract, because you ought to have done something for the purpose of relieving me." I am not satisfied that the person who breaks a contract has a right to insist on that at all ; but if the ship had earned anything the defendant would be entitled to a deduction in respect to that." Again, in *Brace* v. *Calder* (5), where the plaintiff was employed by the defendant, a partnership consisting of four members, as Manager of a branch of their business and the agreement was that he was to be employed for a certain period, but before that period had expired two of the partners retired and the business was transferred to and carried on by the other two, in an action for wrongful dismissal it was held that the plaintiff was only entitled to nominal damages, as the continuing partners were willing to employ the plaintiff on the same terms as before for the remainder of the period and so the plaintiff would have suffered no damage. In that in the present case the appellant reduced his loss by selling the shares at a higher price than obtained at the date of the breach, I think it only equitable to give the respondents the benefit of the higher prices realized. I would therefore dismiss the appeal with costs.

Young, J. — I concur.

K.N./R.K. *Appeal dismissed.*

(1) [1847] 16 L. J. Q. B. 366=5 Ry. Cas. 85=73 R. R. 804.
(2) [1881] 6 Cal. 64=6 C. L. R. 582.
(3) [1840] 12 A. & E. 590=4 P. & D. 307=1 A. & H. 1=11 L. J. Q. B. 221=4 Jur. 1012=113 E. R 935=54 R. R. 624.
(4) 27 L. J. Ex. 465=3 H. & N. 554=6 W. R. 726=31 L. T. (o. s.) 248=1 F. & F. 199=177 R. R. 853.
(5) [1895] 2 Q. B. D. 253=64 L. J. Q. B. 582=14 R. 473=72 L. T. 829=59 J. P. 693.

A. I. R. 1914 Lower Burma 275

ORMOND, J.

Myat Gale — Plaintiff — Appellant.

v.

San Tha and *others* — Defendants — Respondents.

Special Second Appeal No. 220 of 1912, Decided on 11th December 1913.

Civil P. C. (5 of 1908), S. 66 — Real purchaser in possession is not estopped by S. 66 to sue for declaration of title.

A real purchaser at an auction sale who purchases the property sold through a benamidar but remains in uninterrupted possession of the same, is not precluded by S. 66, from suing for a declaration that he is the owner of the property.

[P 276 C 1, 2]

J. N. Lentaigne—for Appellant.
Po Han—for Respondents.

Judgment. — The plaintiff-appellant bought land with her own money at an auction sale in execution of a decree through her son-in-law, defendant 1, and a certificate was made out in his (defendant 1's) name. She has been in uninterrupted possession of the land since 1902 until the institution of the suit. About a year before the institution of the suit defendant 1 transferred the land into the names of his children, the other defendants. The plaintiff stated these facts in the plaint and sued for a declaration that she was the owner. The plaintiff obtained a decree in the Subdivisional Court, but on appeal the Divisional Court held that the suit was barred under S. 66, Civil P. C. That section states that, no suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff.

The case of *Bishan Dial* v. *Ghaziuddin* (1) is very similar to the present case. In that case it was held that the plaintiff based his claim on the benami purchase from the Court and although he alleged he had been in uninterrupted possession, the Court held that the suit was barred by the corresponding section of the old Code, S. 317. The case of *Sasti Churn Nundi* v. *Annopurna* (2) is also a very similar case. There the plaintiff asked that his right might be declared and possession confirmed and that defendant might be restrained from interfering with his tenants. In that case it was held that the suit was not barred by S. 317, because the plaintiff was entitled to rely upon his title by possession only; that the defendant had to set up the sale certificate which stood in his name, and that plaintiff was entitled to rebut the defendant's case by showing that the certificate was benami and that she was in fact the real purchaser as against the defendant. I think it is the duty of the Court to grant such relief as is warranted by the facts stated in the plaint, if those facts are true. It is admitted that the plaintiff has been in uninterrupted possession. It would therefore be for the defendant to make use of this benami certificate; and if he had to sue the plaintiff for possession, he would not be allowed to succeed under that certificate: the defendant would be entitled to say that he was not entitled to possession because the certificate was benami. So too in this case the plaintiff is entitled to show that the certificate set up by the defendant is benami. The decree of the lower Court is set aside and a decree will be passed declaring that the plaintiff is entitled to possession as against the defendants. Each party to bear their own costs.

K.N./R.K. *Decree set aside.*

(1) [1901] 23 All. 175.
(2) [1896] 23 Cal. 699.

A. I. R. 1914 Lower Burma 276

FOX, C. J.

Toon Chan—Appellant.

v.

P. C. Sen (Official Receiver)—Respondent.

Civil Revn. No. 98 of 1907, Decided. on 29th January 1908, from judgment and decree of Small Cause Court, Rangoon, D/- 10th May 1907.

Transfer of Property Act (4 of 1882), S. 50 —Advance payment of rent condition precedent to letting premises — Receiver's claim for rent paid in advance to owner cannot stand.

Where the mortgagor of certain mortgaged premises let them to a tenant after receiving five months' rent in advance as a condition precedent to such letting and subsequently a receiver appointed in the mortgage suit relating to those premises sued for recovery of the same rent.

Held : that the lessee having paid the rent in advance only as a part of his entering into the contract of hiring the premises, could not be compelled to pay it over again to the receiver.

[P 277 C 1]

R. M. Das—for Appellant.
J. R. Das—for Respondent.

Judgment.—This was a suit brought by the receiver appointed in a mortgage suit for rent of one of the mortgaged houses for the months of December 1906 and January and February 1907. The defendant resisted the suit on the ground that he had on 27th October 1906 paid five months' rent in advance to the mortgagor who was in possession and who let him into possession.

The circumstances under which he paid the rents in advance were not in dispute. As previous tenants had left the house without paying the rents due by them, the mortgagors made the defendant pay in the five months' rent in advance.

The plaintiff was appointed receiver on 10th December 1906. He claimed the rent for December apparently on the ground that the rent for that month fell due upon its expiry.

The receiver stood in the shoes of the mortgagees of the house. Whether it was open to him or them to claim for rent is doubtful: vide the notes to *Mop* v. *Gallmiare* in Smith's Leading Cases.

Assuming that he could, the question remains whether he could make the defendant pay to him rents for months for which the defendant had already paid in advance. In support of the contention that he could do so, the cases of *De Nicholls* v. *Saunders* (1) and *Cook* v. *Guerra* (2) were relied on, but those cases are distinguishable from the present inasmuch as according to the contracts in those cases the rents were not due until the expiry of certain periods. In the present case the lessor made it a condition of her letting the premises that rents for five months should be paid in advance. There is no provision of law forbidding such a contract, and when such is the contract, the basis of the reasoning on which the abovementioned cases were decided is absent.

If a lessee pays his rent before it is due it may well be said that he does not pay in fulfilment of an obligation upon him and that such payment must be regarded as an advance to the lessor with an agreement that on the day when the rent becomes due such advance shall be treated as a fulfilment of the obligation to pay rent. But when it is part of the contract, as it was in the present case, that the lessee should pay rent in advance, and the lessee pays in advance, he does so in fulfilment of an obligation under the contract.

In such a case S. 50, T. P. Act, in my opinion, protects him from having to pay over again to a person who may subsequently become entitled to the rents or profits of the property leased.

On these grounds I think the decision of the Small Cause Court was erroneous in law.

The decree is set aside, and the suit is dismissed with costs.

(1) [1870] 5 C. P. 589 = 39 L.J.C.P. 297 = 18 W. R. 1106.
(2) [1872] 41 L. J. C. P. 89 = 26 L. T. 97=20 W. R. 267.

The plaintiff mast pay the defendant's costs of this application.

K.N./R.K. *Decree set aside.*

A. I. R. 1914 Lower Burma 277

TWOMEY, J.

Maung Ngwe Ya—Applicant.

v.

Maung Shwe Ye—Respondent.

Civil Revn. No. 181 of 1909, Decided on 31st January 1911, from decree of Dist. Judge, Hanthawaddy, in Appeal No. 129 of 1909.

Tort—Negligence—Animals—Damages for injury caused by demestic animal—Knowledge on the part of owner as to its ferocious nature—Burden of proof of negligence is on plaintiff.

In a suit brought for damages for injury caused by a buffalo against its owner, it is for the plaintiff to prove that the damage was caused by the owner's negligence and the owner's knowledge or want of knowledge that his animal was of a vicious disposition is an important point in deciding his negligence: (1897-1901) 2 *U. B. R.* 570, *Foll.* [P 277 C 1]

Harvey—for Applicant.

R. N. Banerjee—for Respondent.

Judgment.—The respondents' buffalo gored the applicant's buffalo and broke its leg rendering it useless. The Township Court awarded damages, but the District Court on appeal set aside the Township Court's decree and dismissed the suit, holding that negligence on the part of the defendant (respondent) was not proved. The District Judge remarked also: "I do not think it proved that the defendant knew that his buffalo was a dangerous animal." The only ground of this application for revision is that the Judge erred in holding that defendant's knowledge that the buffalo was a vicious animal was essential.

In cases of this kind the Upper Burma ruling in *Maung Kyaw Dun* v. *Ma Kyin* (1) may well be followed. It is for the plaintiff to prove that the damage done to his animal was caused by the defendant's negligence, and in deciding whether the defendant was negligent or not his knowledge or want of knowledge that his animal was of a vicious disposition is an important point. Where the animal that does the injury is a domestic animal, as in this case the burden of proving negligence lies in the first place on the plaintiff. It might be other-

(1) [1897-1901] 2 U. B. R. 570.

wise if the injury were caused by a tiger or a bear.

In the present case, proof is wanting not only that the defendant had any knowledge that his animal was of a vicious disposition, but that the animal had, as a matter of fact, evidenced any signs of special viciousness before goring the plaintiff's buffalo.

The application for revision is dismissed with costs.

K.N./R.K. *Application dismissed.*

A. I. R. 1914 Lower Burma 278

ORMOND AND TWOMEY, JJ.

Maung Pu and *others*—Appellants.

v.

Lucy Moss and *another*—Respondents.

First Appeal No. 83 of 1912, Decided on 24th June 1914

Contract Act (9 of 1872), S. 16—No presumption of undue influence in India or England exists in case of gift to children.

Under English law there is no presumption of undue influence in the case of a gift to a son grandson or son-in-law, even if made during the donor's illness and a few days before his death: *Beanland* v. *Bradley*, 2 Sm. & G. 339, quoted in *Lord Halsbury's Laws of England*, *Vol.* 15, *at p.* 108, *Ref.* [P 280 C 1]

The Indian law in this respect would be the same. Otherwise no gift by an old father to his son would be valid unless the son could show that the confidential relationship, i.e., the intimate relationship of father and son, had ceased: *Morley* v. *Loughnan*, (1893) 1 *Ch. D.* 736, *Ref*; 33 *Cal.* 773 (*P.C.*), *Foll.* [P 280 C 1]

Lentaigne—Appellants.

N. M. Cowasjee and *Dantra*—for Respondents.

Ormond, J.—This was a suit originally instituted by Ma Hmwe Gaing, the widow of John Nepean deceased, against Maung Pu (her son-in-law), Mi Mi (her adopted daughter), (Maung Pu's wife), Ma Kin Min (another adopted daughter) and Maung Shu Maung the minor son of Mi Mi and Maung Pu), to set aside a deed of gift, dated 5th March 1909. on the ground that it was obtained by the undue influence of Maung Pu. Ma Hmwe Gaing died during the pendency of this suit and her daughter and son Lucy Moss and Charles Nepean, were substituted as the plaintiffs. Mi Mi, wife of Maung Pu also died and her representatives were substituted in her place. The plaintiffs obtained a decree on the original side of this Court and the defendants now appeal.

Ma Hmwe Gaing had a house at Shwegyin where she lived. She was an old lady of over 80 years of age. Her husband John Nepean, who died about 30 years ago, left a thousand acres of land and Rs. 10,000 to his wife and to each of his three children Lucy Moss, Charles Nepean and George Nepean, since deceased. Maung Pu is an advocate of this Court. After marrying Mi Mi he was sent to England and was called to the Bar and his expenses were partly defrayed by his mother-in-law, Ma Hmwe Gaing. Shortly after he had returned to this country, Ma Hmwe Gaing in July 1908 made a gift of her 1,000 acres in five equal shares to her two adopted daughters, Mi Mi and Ma Kin Min, and her three natural grandchildren and she appointed Maung Pu as the manager and trustee at a remuneration of 20 per cent of the profits. In August .1908, Ma Hmwe Gaing gave Rs. 37,000 to Maung Pu to invest for her. At that time Maung Pu was living in Rangoon. Ma Hmwe Gaing was living at Shwegyin and Mrs. Lucy Moss was also living at Shwegyin next door to her mother's. Early in October 1908 Ma Hmwe Gaing wanted the money back and it is clear from the evidence that she wanted it back because her daughter Mrs. Lucy Moss had given her to understand that Maung Pu was making a wrong use of the money.

Maung Pu and his wife came over to Shwegyin and Ma Hmwe Gaing then wanted to go and stay with Maung Pu at Rangoon. Mrs. Lucy Moss did her best to persuade her mother not to go. In order to prevent her going, Mrs. Lucy Moss on Saturday the 17th October took away her mother's jewelry box and returned it on 20th October, Tuesday. On that night the old lady, Ma Hmwe Gaing and her adopted daughter. Ma Kin Min, went with Maung Pu and Mi Mi to Rangoon and stayed with them there until July 1909. On the next day (21st October) Charles Nepean filed a civil suit against his mother and the beneficiaries to set aside the deed of settlement of July 1908 and on the same day Charles Nepean and his sister Mrs. Lucy Moss, filed a complaint (purporting to act on behalf of their old mother) against Maung Pu and Mi Mi of a criminal misappropriation of the money entrusted to Maung Pu for investment Rupees 16,000 of the

money had been placed on deposit by Maung Pu and the deposit receipt given to his mother-in law. Mrs. Lucy Moss obtained possession of this receipt and refused to give it back to her mother. On 5th January 1909 an agreement for the purchase of a house at a price of Rs. 35,000 was made in the name of Mi Mi and Rs. 5,000 was paid to the vendor. On 15th January 1909 Rs. 15,000 was paid and on 15th February 1909 the balance of Rs. 15,000 was paid and possession given.

On 5th March 1909 Ma Hmwe Gaing executed a deed of gift of certain jewelry to her two adopted daughters and Rs. 36,000 in three equal shares to her two adopted daughters, Mi Mi and Ma Kin Min, and Maung Shu Maung, the minor son of Maung Pu and Mi Mi. That document was prepared by Mr. Rahman, an Advocate of this Court, who had received instructions from Ma Hmwe Gaing two months previously. That is the dccument which is sought to be set aside. On 11th February 1909 the deposit receipt having been recovered by Ma Hmwe Gaing, Rs. 16,000 was transferred from deposit to current account in the name of Maung Pu. The moneys paid for the house were the moneys belonging to Ma Hmwe Gaing and formed part of the original Rupees 37,000, and it is clear that that was the money which Ma Hmwe Gaing intended to make a gift of. In July 1909 Ma Hmwe Gaing became very ill and Maung Pu telegraphed to Mrs. Lucy Moss to come to Rangoon. She came and found her mother very ill and shortly after she took her back to Shwegyin. On 23rd November 1908 the old lady filed a written statement in Charles Nepean's suit (to set aside the settlement of July 1908), in which she supported the settlement, but on 29th July 1909 after she had returned to Shwegyin after her illness, she filed a second written statement in which she confessed judgment and consented to a decree for the relief prayed for. On 5th January 1909 the day when the agreement for the purchase of the house was made Colonel Davis was called in and he certified that the old lady was of sound mind and capable. On 5th March 1909 when the deed of gift was executed Major Rost was called in and he certified to the same effect. Charles Nepean having alleged in his plaint (in October 1908) in the suit to set aside the settlement of July 1908 that Ma Hmwe Gaing was 82 years old and her mental capacity had been affected by old age and that she was under the influence of Mi Mi and Maung Pu, it was only prudent on the occasion of this second gift to have reliable medical evidence to show that the old lady's mental capacity was not impaired. The learned Judge held that the deed could not be set aside on the ground of unsoundness of mind in the old lady, bnt he found that she was of weak intellect and infirm and liable to be influenced and that she did not have full capacity of knowledge as to what she was doing, that the gift was produced by influence brought to bear upon her and further that the relationship which existed between her and Maung Pu and his wife was such as would bring the case within the purview of the rule of equity as to confidential relationship and that therefore even assuming that the gift was properly made, it was the effect of influence induced by those relations and that the burden therefore lay on Maung Pu to show that she had independent advice or that she adopted the transaction after the influence was removed.

The learned Judge, in finding that at the time of the gift the old lady was of weak intellect, infirm and liable to be influenced and that she did not have full capacity or knowledge as to what she was doing, relied upon the evidence of Colonel Davis. Colonel Davis at the hearing, though called as a witness for the plaintiff. emphasizes the fact that the old lady was fairly clear and understood clearly enough what she was doing. In my opinion there is nothing in the evidence to warrant the finding that the old lady was of weak intellect. Colonel Davis says that she might have have been influenced. He came to that conclusion owing to the want of decision that she displayed. She appeared to him to be vacillating and undecided because she would mix up the buying of the house with giving money to buy the house. He goes on to say: "I think she knew she was giving a large sum of money for buying a house and was quite willing to do so. But at the same time I think she might have been influenced; her willingness may possibly

have been due to influence brought to bear upon her." At that time there was only a contract to buy the house and the old lady may well have considered the house was really her gift. But there is nothing in Colonel Davis' evidence to show that the old lady was at any time vacillating or undecided about making the gift: whether the gift took the form of the house or of the purchase-money for the house. His surmise that she might possibly have been influenced is a pure hypothesis which has nothing to support it. There is nothing in the evidence to show that the gift was induced by influence exerted by Maung Pu.

The learned Judge has found that there was a confidential relationship existing between the old lady and Maung Pu and his wife which vitiated the gift, unless Maung Pu could show that the gift was made without any influence having been exerted by him. The learned Judge has, I think overlooked the fact that under English law there .is no presumption of undue influence in the case of a gift to a son, grandson or son-in-law even if made during the donor's illness and a few days before his death: *Beanland* v. *Bradley* (1) quoted in Lord Halsbury's Laws of England, Vol. 15, at p. 108. The Indian law in this respect would be the same. Otherwise no gift by an old father to his son would be valid unless the son could show that the confidential relationship, i. e., the intimate relationship of father and son, had ceased.

The learned Judge has relied to a great extent upon the English decision of *Morley* v. *Loughman* (2). That was a very strong case in which the donee was to all intents and purposes in the position of both medical and spiritual adviser to the donor. Mr. Cowasjee, for the respondents, has urged before us that the confidential relationship of lawyer and client existed and that Maung Pu was the old lady's legal adviser. This suggestion was first made in appeal; no mention of it is to be found in the plaint or in the issues. Maung Pu no doubt consulted lawyers on behalf of the old lady and he may have given her legal advice; but I think he clearly did so as a son-in-law and not as a professional lawyer. It is clear that Mrs. Lucy Moss tried to exert her influence over the old lady to prevent her from benefiting her adopted children. There is nothing to show that Maung Pu exerted any counter influence but assuming that he did, there was no undue influence. The remarks of their Lordships of the Privy Council in the case of *Ismail Mussajee Mockerdum* v. *Hafiz Boo* (3) are apposite. The transaction was very natural and reasonable under the circumstances existing at the time. The natural family had been provided for. The old lady must have been deeply irritated by the conduct of Mrs. Lucy Moss and Charles Nepean in seizing her jewels and in filing the criminal and civil proceedings in October 1908 and she had never wished to benefit them. She was old and in case of her death they would have inherited equally with the adopted children. As in the case cited above, there is no evidence establishing any general case of domination on the part of Maung Pu and his wife and of subjection on the part of the donor. Even if a presumption is to be raised against Maung Pu in this case with reference to the interest taken by Maung Pu's wife and child under the gift, no such presumption could be raised in connexion with the interest taken by Ma Kin Min who had lived all along with her adoptive mother. The gift to her could only be set aside if it were established by evidence that the gift had in fact been induced by undue influence; and there is no such evidence, In my opinion the plaintiffs have failed to make out their case, and no onus rested on Maung Pu to disprove influence. I would allow the appeal with costs in both Courts, ten gold mohurs a day as advocate's fee for every day's effective hearing after the first in both Courts.

Twomey, J.—I concur.

K.N./R.K. *Appeal allowed.*

(1) [1854] 2 Sm. & G. 339=65 E. R. 427.
(2) [1893] 1 Ch. D. 736=3 R. 592=68 L. T. 619=62 L. J. Ch. 515.
(3) [1906] 33 Cal. 773=33 I. A. 86=3 C. L. J. 484=10 C. W. N. 570=3 A. L. J. 353=16 M. L. J. 166=8 Bom. L. R. 379 (P.C.).

END

THE

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Absence of Star denotes Cases of Provincial or Small Importance.
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NOMINAL INDEX

B

Bhai Khan v. Des Raj 17

E

Emperor v. Ah Pein Shok 15 (1)
——— v. Mi Mein Gale 22
——— v. Nga Kyauk Lon 3 (1)
——— v. Nga Nyan U 43 (2)
——— v. Nga Nyo 5 (1)

H

Hidayat Ali Beg Mirza v. Nga Kyaing 3 (2)
Hodgkinson Lack v. P. Gallagher 12

I

Ismail v. A. H. Nolan 28

J

Jugaram v. Nga Tun Baw 5 (2)

K

Kalima Bibi v. Macbul Ahmed 18
Katan v. Nga Tin 11 (1)

M

Mi Hlaing v. Mi Thi 33
Mi Hmat Tok v. Nga Kywe Hla 2
Mi Ngwe Hmon v. Mi Pwa Su 34
Mi Saing v. Nga Yan Gin 56
Mi Saw Bwin v. Nga San Nyun 54
Mi Thein v. Nga Po Nyun 1
Mi The O v. Mi Swe 45

N

Nga Chok v. Mi Pwa On 11 (2)
Nga E v. Nga Aung Thein 51
Nga Hla Gyaw v. Mi Ya Po 53
Nga Kan Hla v. Emperor 31 (2)
Nga Myo v. Nga Kyan 29
Nga Nyun v. Nga Po O 27
Nga Pi v. Nga Kyan Tha 19
Nga Po v. Nga So Pe 44
Nga Po Kan v. Nga Shwe Dat 49
*Nga Po Thin v. U Thi Hla 6
Nga Saw Ke v. Emperor 31 (1)
Nga Shwe Myo v. Emperor 33
Nga Ti v. Nga Pin 43 (1)
Nga Tun E v. Emperor 26
Nga Tun E v. Mi Chon 36

R

Ramchandra v. Latchman Pillay 15 (2)

U

U Tilawka v. Nga Shwe Kan 39

W

Wa Foon v. Ma Thein Tin 30

SUBJECT INDEX

B

Buddhist Law (Burmese)

——Marriage—Second divorce after reunion by mutual consent — Parties are again to be treated as bachelor husband and maiden wife—Rules of partition between them enunciated **56**

——Divorce—Suit for bare divorce does not lie **54**

——Inheritance — Dhammathats give one-fourth to orasa son—Orasa son does not include minor sons **51*a***

——Widow — Widow is full owner of her three-fourths share—It passes on her death to her heirs—Creditors can attach and sell it **51*b***

——Inheritance — Eldest daughter — Nature of eldest daughter's interest in mother's lifetime—Rules of eldest daughter's inheritance stated **45**

Buddhist Law (Burmese)

——Monk cannot enter into valid contract for his own benefit **39**

——Inheritance—Orasa daughter's claim to get one-fourth after father's death does not apply in case of mother not remarrying **38**

——Ecclesiastical — Monk is competent to hold property and can act as owner—Property dedicated personally is not transferable—Monastery is sanghika and not poggalika **6*b***

——Ecclesiastical—Appropriation by one monk of property of another when valid stated **6*c***

——**(Chinese)**

——Marriage—Chinese Buddhist man's law will govern his marriage with Burmese Buddhist woman **30*b***

Burma Laws Act (13 of 1898)
——**S. 13**—Question of paternity of child does not come under S. 13 **36***b*
Burma Village Act (6 of 1907)
——**S. 19**—Proof of building house without permission after Act is necessary for conviction **5 (1)**

C

Civil Procedure Code (5 of 1908)
——**S. 9**—Suit for possession of monastery is cognizable **6***a*
——**S. 11**—Appeal leaving finding on an issue undecided cannot operate as res judicata **43 (1)**
——**S. 63** and **O. 21, R. 52**—Money in the hands of Court of another district cannot be attached **15 (2)***a*
——**S. 73**—Money attached before judgment is liable to rateable distribution **15 (2)***b*
——**O. 3, R. 2**—R. 2 cannot enable unqualified person to make it his business to appear for parties under special powers-of-attorney **27**
——**O. 7, R. 6** and **O. 41, R. 1**—Grounds for exemption must be stated in memorandum **49***b*
——**O. 38, R. 5**—Property outside jurisdiction cannot be attached **17***a*
——**Sch. 2, Para. 15 (1) (a)**—Submission to arbitration cannot be revoked without good cause—Absence of notice of meeting to party already withdrawing does not invalidate award **53***a*
——**Sch. 2, Para. 20**—Procedure under para. 20 is not obligatory—Suit to enforce award lies—Ad valorem court-fee is payable—Court-fees Act (7 of 1870), S. 7 (10) (d) **53***b*
Contract Act (9 of 1872)
——**Ss. 9** and **70**—Court can fix reasonable remuneration to medical man even though no fees fixed **12**
——**S. 23**—Promissory note made payable to order or bearer being opposed to S. 24, Paper Currency Act, is void **3 (2)***a*
——**S. 62**—Promissory note—Suit on original consideration can lie **3 (2)***b*
Court-fees Act (7 of 1870)
——**S. 7 (10) (d)**—Civil P. C. (5 of 1908), Sch. 2, Para. 20—Procedure under para. 20 is not obligatory—Suit to enforce award lies—Ad valorem court-fee is payable **53***b*
Criminal Procedure Code (5 of 1898)
——**S. 110**—Order in respect of sureties must be reasonable and not arbitrary **33**
Criminal P. C.
——**Ss. 119** and **437**—S. 437 does not apply to proceedings under Ch. 8—Further inquiry cannot be ordered of person discharged under S. 119—Notice must be given **28**
——**S. 133**—Order not to inoculate cannot be passed as it is not carrying on trade injurious to health **3 (1)**
——**Ss. 155** and **190 (1) (b)**—Police report in noncognizable case if doubted, investigation under S. 155 can be ordered but the officer cannot be examined as complainant—It is a report within S. 190 (1) (b) **31 (1)**
——**S. 195 (6)**—Sanction should not be revoked without notice to other side **11 (1)**
——**S. 250**—Complaint frivolous or vexatious—If also false, application of S. 250 is not barred—Charge of bribing if false is vexatious **29**
——**S. 488**—Evidence of marriage is essential **30***a*
——**S. 488**—Maintenance to child—Mother's position is immaterial—Merely sending man to ask child to come is not sufficient offer to look after it **1**
Criminal Trial
——Sentence—Lesser penalty is not obligatory in murder charge in case of youth—Penal Code (1860), S. 302 **31(2)***b*
——Stay of—When should criminal trial be stayed if civil suit is pending stated **18**

E

Evidence Act (1 of 1872)
——**S. 57 (1)**—Court can take judicial notice of provision of law invalidating suit even though not pleaded **3(2)***d*
——**S. 112**—Legitimacy—Presumption can be rebutted by strict proof of non-access—If husband had access adultery will not conclude illegitimacy—Impotence is tantamount to non-access **36***a*

I

Interpretation of Statutes
——Legislative proceedings cannot be referred to **17***b*

L

Landlord and Tenant
——Tenant on ejectment is entitled to compensation for trees planted **2**
Limitation Act (9 of 1908)
——**S. 5**—Delay due to presentation in wrong Court through ignorance held not sufficient cause **49***a*

Limitation Act
—**Art. 142**—Art. 142 applies to suit for ejectment of trespasser from land allowed to lie fallow—Plaintiff must prove ownership and possession within 12 years—Meaning of discontinuance of possession explained **44**

N

Negotiable Instruments Act (26 of 1881)
—**S. 120**—Payee of instrument payable to bearer is not holder in due course **3(2)***c*

O

Opium Act (1 of 1878)
—**S. 9 (c)**—Possession of three tolas of beinchi by non-Burman is allowed by rules of 1910 **15(1)**

P

Penal Code (45 of 1860)
—**S. 84**—Mental derangement if not amounting to unsoundness of mind does not affect—Lesser sentence may be justified in case of mental derangement **31(2)***a*
—**Ss. 215** and **379**—Conviction under S. 215 of one convicted for theft is not correct **43(2)**
—**S. 302**—Criminal Trial—Sentence—Lesser penalty is not obligatory in murder charge in case of youth **31(2)***b*
—**S. 317**—Child thrown in bush by mother—Mother held guilty under S. 317 **22**

Penal Code
—**Ss. 322** and **325**—Intention of causing grievous hurt must be judged—If intention is of simple hurt S. 325 cannot apply **26**

Promissory Note
—Suit on original consideration can lie—Contract Act, S. 62 **3(2)***b*

Provincial Insolvency Act (3 of 1907)
—**Ss. 11** and **43**—Omission to mention property in list under S. 11 is concealment within S. 43 **11(2)***a*
—**S. 43**—Transfer includes sale, mortgage or gift **11(2)***b*

R

Riparian Rights
—Riparian proprietor can take any amount of water for ordinary purposes, but for irrigation he must take only reasonable quantity unless he acquires right by prescription **19**

T

Tort
—Slander—Repetition of slander is actionable—Criminal law of defamation does not apply—Truth is complete defence **34**

W

Workmen's Breach of Contract Act (13 of 1859)
—**S. 2**—Employer stopping work and making settlement for repayment—Act ceases to apply for any breach **5(2)**

THE ALL INDIA REPORTER

1914 UPPER BURMA COMPARATIVE TABLES

(PARALLEL REFERENCES)

TABLE No. I

Showing seriatim the pages of UPPER BURMA RULINGS, for the year 1914, with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of 2 UPPER BURMA RULINGS.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

2 Upper Burma Rulings (1914 only)=All India Reporter.

UBR)	A. I. R.	UBR)	A. I. R.	UBR)	A. I. R.	UBR)	A. I. R.	UBR)	A. I. R.
1*a*	1914 *UB* 15	13	1914 *UB* 3	23	1914 *UB* 36	32	1914 *UB* 54	44	1914 *UB* 33
1*b*	" " 11	16	" " 17	26	" " 53	35	" " 26	46	" " 45
3	" " 28	18	" " 5	28	" " 31	37	" " 51	61	" " 39
5	" " 22	19*a*	" " 31			40	" " 38		
11	" " 2	19*b*	" " 12	31	" " 29	43	" " 43	127	" " 56

TABLE No. II

Showing seriatim the pages of other REPORTS, JOURNALS and PERIODICALS for the year 1914 with corresponding references of the ALL INDIA REPORTER.

7 Burma Law Times=All India Reporter.

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1914 Lower Burma.**

15 Cr. L. J. & 22 to 25 Indian Cases=All India Reporter.

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1914 Lahore.**

TABLE No. III

Showing seriatim the pages of ALL INDIA REPORTER, 1914 UPPER BURMA with corresponding references of other REPORTS, JOURNALS and PERIODICALS.

N. B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1914 UPPER BURMA.

Column No. 2 denotes corresponding references of other REPORTS and JOURNALS.

A. I. R. 1914 Upper Burma=Other Journals.

A.I.R.)	Other Journals	A.I.R.)	Other Journals	A.I.R)	Other Journals	A.I.R)	Other Journals
1	7 *Bur L T* 34	12	2 *U B R* 19		15 *Cr L J* 531		28 *I C* 806
	23 *I C* 486		25 *I C* 777		24 *I C* 843	39	2 *U B R* 61
	15 *Cr L J* 278	15 (1)	2 *U B R* 1	29	2 *U B R* 31		29 *I C* 613
2	2 *U B R* 11		15 *Cr L J* 532		26 *I C* 1004	43 (1)	7 *Bur L T* 249
	24 *I C* 708		24 *I C* 844		16 *Cr L J* 92		27 *I C* 959
3 (1)	1 *U B R* 180	15 (2)	7 *Bur L T* 277	30	7 *Bur L T* 71	43 (2)	2 *U B R* 43
	23 *I C* 205		26 *I C* 941		15 *Cr L J* 484		16 *Cr L J* 421
	15 *Cr L J* 253	17	2 *U B R* 16		24 *I C* 572		28 *I C* 997
3 (2)	2 *U B R* 13		25 *I C* 771	31 (1)	2 *U B R* 19	44	7 *Bur L T* 255
	24 *I C* 721	18	7 *Bur L T* 73		27 *I C* 145		27 *I C* 981
5 (1)	1 *U B R* 180		15 *Cr L J* 488		16 *Cr L J* 97	45	2 *U B R* 46
	23 *I C* 202		24 *I C* 576	31 (2)	2 *U B R* 28		28 *I C* 821
	15 *Cr L J* 250	19	7 *Bur L T* 282		26 *I C* 1007	49	7 *Bur L T* 250
5 (2)	2 *U B R* 18		26 *I C* 974		16 *Cr L J* 95		27 *I C* 967
	15 *Cr L J* 662	22	2 *U B R* 5	33	2 *U B R* 44	51	2 *U B R* 37
	25 *I C* 990		15 *Cr L J* 525		28 *I C* 998		28 *I C* 804
6	1 *U B R* 182		24 *I C* 837		16 *Cr L J* 422	53	2 *U B R* 26
	7 *Bur L T* 27	26	2 *U B R* 35	34	7 *Bur L T* 253		7 *Bur L T* 279
	23 *I C* 157		16 *Cr L J* 431		27 *I C* 979		27 *I C* 31
11 (1)	7 *Bur L T* 205		28 *I C* 1007	36	2 *U B R* 23	54	2 *U B R* 32
	15 *Cr L J* 571	27	7 *Bur L T* 206		26 *I C* 996		28 *I C* 801
	25 *I C* 323		25 *I C* 163		16 *Cr L J* 84	56	2 *U B R* 127
11 (2)	2 *U B R* 1		2 *U B R* 3	38	2 *U B R* 40		11 *Bur L T* 89
	24 *I C* 767	28					38 *I C* 405

THE
ALL INDIA REPORTER
1914
UPPER BURMA J. C.'s COURT

A. I. R. 1914 Upper Burma 1

SAUNDERS, A. J. C.

Mi Thein—Applicant.

v.

Nga Po Nyun—Respondent.

Criminal Revision No. 559 of 1913, Decided on 30th October 1913.

Criminal P. C. (5 of 1898), S. 488—Maintenance to child—Mother's position is immaterial—Merely sending man to ask child to come is not sufficient offer to look after it.

A father is bound to maintain his child whatever the position of the mother may be and merely sending a man to go and ask the child to come and live with the father does not amount to an offer to look after him and cannot absolve the father from his responsibility to maintain him. [P 1 C 1, 2]

Bose—for Applicant.

M. S. Mukerjee—for Respondent.

Order.—The applicant sought to obtain an order for the maintenance of her son, aged about 12, from the respondent. The paternity of the child is not denied and the respondent said that he had never neglected to maintain the child, that he had asked for the custody of it and made several offers to maintain the child on condition that he lived with him. The Magistrate after recording evidence declined to make an order and the applicant now comes to this Court in revision.

Most of the reasons given by the learned Magistrate appear to be erroneous. "I consider that the complainant is able to maintain Tha Gyaw without assistance from accused." This is no reason. The father if he is able to do so is bound to maintain his child whatever the position of the mother may be. Whether she makes the application to annoy the father or not is immaterial. It is also immaterial that when the boy goes to see his father, the father gives him a little money and once gave him a longyi. Obviously the father does not provide sufficient funds for his maintenance. It is not necessary for a mother to prove that she had asked the father to support the son and the father has refused. The mere fact that it is necessary to institute proceedings may be taken to prove the neglect of the father.

The property which was made over to the mother at the time of the divorce, she says, has all been dissipated, and this is borne out by the evidence of the respondent's own witnesses, Mg. Yo and Mg. Shwe Tin.

There does not appear to be any evidence of any bona fide offer to support the son if he would live with his father. Mg. Si, the respondent's witness, says that he went and asked Tha Gyaw, the child, and Tha Gyaw replied: "I won't live with him." This man is the respondent's tenant. It is obviously absurd to suggest that this invitation given to the child can amount to an offer to look after him, and on the authority of *Mi Saw* v. *S* (1) such an offer cannot absolve the father from his responsibility to the latter. The respondent is bound to maintain the child. The appellant says that it costs her Rs. 7-8-0 a month. From the evidence the respondent is clearly able to pay this sum, but there has been some exaggeration on the appellant's part and I think it will be sufficient if the father pays Rs. 6 a month. There will be an order therefore for the payment of this amount.

K.N./R.K. *Application accepted.*

(1) [1910] 1 U. B. R. 1=7 I. C. 460=11 Cr. L. J. 488.

A. I. R. 1914 Upper Burma 2

SHAW, J. C.

Mi Hmat Tok and *others*—Appellants.

v.

Nga Kywe Hla and *others*—Respondents.

Second Appeal No. 374 of 1914, Decided on 2nd March 1914.

Landlord and Tenant—Tenant on ejectment is entitled to compensation for trees planted.

Following the rule stated in S. 108 (b), T. P. Act, as a rule of justice, equity and good conscience:

Held: that a tenant is entitled on ejectment to compensation for trees that he has planted.

[P 3 C 1]

C. G. S. Pillay—for Appellants.

S. Mukerjee—for Respondents.

Judgment.—These are cross-appeals under S. 13, Upper Burma Civil Courts Regulation. I deal with them together and refer to the parties simply as plaintiffs and defendants. Plaintiffs sued for possession of 20 mango trees standing on 154 acres of land, holding No. 55, Kyegyaung-kwin. They alleged that the land belonged to them and that they had let it, or rather that their predecessor had let it to the father of the defendants 20 years before suit; that the defendants and their father planted the mango trees on the understanding that they would hand over the trees with the land when the lease was determined, but that when plaintiffs demanded the return of the land with the mango trees, the defendants made over the land only and refused to give up the trees. Plaintiffs valued the trees at Rs. 96.

The defendants said that the land belonged to the joint ancestor of the parties and was never let to their father, Nga Pein. They denied also that the trees were planted with the plaintiffs' permission in the circumstances alleged, and denied that they returned the land. They valued the trees at Rs. 461.

The Courts below agreed in finding that the land belonged to the plaintiffs exclusively and was let to the defendants as alleged; that the plaintiffs received rent and that they got back the land. They also agreed that the value of the trees was, as the plaintiffs alleged, and not as the defendants alleged. In those findings I entirely concur.

The only point remaining for decision is as to whether the defendants were entitled to compensation for the mango trees. The authorities cited by the Township Court in support of its view that the defendants were not entitled to compensation were not authorities to that effect. As the learned Additional Judge of the District Court observed, the case of *Nga O* v. *Sau Ko* (1) was a case of a usufructuary mortgage. Under the Transfer of Property Act, S. 108 (h), the rule in respect to leases is different. On this point Dr. Gour says in his commentary: "The term attached to the earth" is defined in S. 3, and therefore all things which come within the purview of that definition may be removed by the tenant. Thus, for example, trees, shrubs . . . . . .planted . . . . . by the tenant may be removed by him, but they must be removed before the determination of his tenancy after which he cannot be allowed to sever them. In England the lessee would at no time be entitled to remove these which would there be usually treated as permanent fixtures . . ." But it may be here mentioned that this rule was never followed in India even before the passing of the Act.

Thus in the Full Bench case decided as far back as 1866, it was laid down that according to the usages and customs of this country, buildings and other such improvements made on land do not by the mere accident of their being attached to the soil become the property of the owner of the soil. The general rule is that if he who makes the improvements is not a mere trespasser, but is in possession under any bona fide title or claim of title, he is entitled either to remove the materials restoring the land to the state in which it was before the improvement was made or to obtain compensation for the value of the building if it was allowed to remain for the benefit of the owners of the soil, the option of taking the building or allowing the removal of materials remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate which he may possess. And this rule is, it may be stated, at least as old in India as the corresponding contrary rule in England." He proceeds to quote from the Hindu and Mahomedan laws in support of this statement and refer to a similar rule in Justinian's Institutes and goes on: "The principle of the maxim *quicquid plantatur*

(1) [1892-96] 2 U. B. R. 548.

solo solo cedit has then no sanction in either the text or case law of this country . . . . . and it is sufficient to say that the rule now sanctioned by the legislature has been uniformly followed in this country, both on account of its being consistent with the sacred texts, as with justice, equity and good conscience."

The lower appellate Court did not condescend to cite any authority for holding that the defendants were entitled to any compensation, but I think that the quotation which I have just made from Dr. Gour's commentary furnishes ample authority for following the rule stated in S. 108 (h), T. P Act, as a rule of justice, equity and good conscience.

It follows that the decision of the lower appellate Court was right, and that the cross-appeals must both be dismissed.

As the Courts below have both found that the defendants returned the land to the plaintiffs, and as this finding is supported by the evidence, I do not consider it necessary to allow the plaintiff to amend the plaint. In view of the foregoing findings on the facts, reference to *Po Chein* v. *Mi Pwa Thein* (2) is irrelevant.

The lower appellate Court ordered the parties to bear their own costs, and I think that in view of the course which the case took this was a proper order. The parties will bear their own costs in the present appeals.

K.N./R K. *Appeal dismissed.*

(2) [1907-09] 2 U. B. R. Civ. Pro. 21.

A. I. R. 1914 Upper Burma 3 (1)

SAUNDERS, A. J. C.

Emperor

v.

Nga Kyauk Lon and *others*—Opposite Parties.

Criminal Revision No. 568 of 1913, Decided on 15th August 1913.

Criminal P. C. (5 of 1898), S. 133—Order not to inoculate cannot be passed as it is not carrying on trade injurious to health.

Some persons, who inoculated and admitted inoculating their children upon an outbreak of small-pox, were ordered under S. 133 to stop the practice.

Held: that the section did not apply, inasmuch as the persons could not be said to be carrying on a trade or to be engaged in an occupation. [P 3 C 2]

Judgment.—The order of the District Magistrate is not a legal order. The respondents were six persons who were reported to have inoculated and admitted inoculating their children upon an outbreak of small-pox. They have been ordered to stop this practice under S. 133, Criminal P. C. The only part of S. 133 which could possibly apply is that which refers to the prohibition of any trade or occupation which is injurious to health. These persons cannot clearly be said to be carrying on a trade or to be engaged in an occupation. The order is set aside.

In any case the joint proceeding against six persons does not appear to have been justified.

K.N./R.K. *Order set aside.*

A .I. R 1914 Upper Burma 3 (2)

SHAW, J. C.

Mirza Hidayat Ali Beg—Plaintiff—Appellant.

v.

Nga Kyaing—Defendant—Respondent.

Second Appeal No. 432 of 1914, Decided on 27th March 1914.

(a) Contract Act (9 of 1872), S. 23—Promissory note made payable to order or bearer being opposed to S. 24, Paper Currency Act, is void.

A promissory note made payable to "so and so or order or bearer," contravenes the provisions of S. 24, Paper Currency Act, and is therefore void under S. 23, Contract Act. Nothing can be recovered on the document. [P 4 C 2]

(b) Promissory note—Suit on original consideration can lie—Contract Act, S. 62.

If the promissory note which is void is executed for a debt which already exists, the promisee can sue on the original consideration. [P 5 C 1]

(c) Negotiable Instruments Act (26 of 1881), S. 120 — Payee of instrument payable to bearer is not holder in due course.

Under S. 120 a holder in due course does not include the payee of a negotiable instrument payable to bearer. [P 4 C 2]

(d) Evidence Act (1 of 1872), S. 57 (1)—Court can take judicial notice of provision of law invalidating suit even though not pleaded.

Courts are bound, under S. 57 (1), to take judicial notice of the provisions of S. 24, Paper Currency Act, without the defendant having raised the objection in his defence at all. [P 4 C 2]

K. K. Roy—for the Crown.

A. C. Mukerjee—for Accused.

Judgment.—Plaintiff-appellant sued for Rs. 1,414 being the balance of principal and interest due on a promissory note. The Subdivisional Court dismissed the suit on the ground that the promissory note was payable to bearer on demand, and therefore contravened S. 24, Paper Currency Act 3 of 1905, an ob-

jection taken by the defendant-respondent in his written statement. The learned Judge relied upon the Lower Burma case of *Maung Po Tha* v. *D'Attaides* (1).

The plaintiff-appellant on appeal to the District Court contended that the promissory note was not payable to bearer, that the defendant-respondent was estopped by S. 115, Evidence Act, from setting up an illegal act of his own as a defence; also that plaintiff-appellant was entitled to a decree on the defendant-respondent's admission. The District Court found against the plaintiff-appellant on all these points and dismissed the appeal.

Plaintiff-appellant now comes up in second appeal under S. 100, Civil P. C. On his behalf several objections are taken. First, it is contended that the promissory note is not payable to bearer on demand. The actual wording of the document was "On demand I, the undersigned so and so, promise to pay to Mirza Hidayat Ali Beg . . . . . or order or bearer the sum of Rs. 1,000 only, etc." The learned advocate argues that the words " or order" govern the interpretation of the words "or bearer" and therefore "or bearer" means the bearer of the order, in other words, the meaning is just the same as if "or bearer" had not been added. He is unable to cite any case in which a promissory note worded in this manner has been interpreted in the way in which he wishes the present document to be interpreted; and the authorities which he cites do not, in my opinion, support his contention at all. Properly speaking a document, say cheque, may be made payble to "so and so or order" or else may be made payable to "so and so or bearer." It is not correct to make it payable to "so and so or order or bearer," but if this incorrect wording is used, I think that clearly the words "or bearer" make it a document payable to bearer.

The next point is one raised tentatively by Farran, J., in *Jetha Parkha* v. *Ramchandra Vithaba* (2) to the effect that the provisions of S. 24, Paper Currency Act, do not prevent the payee of a promissory note made payable to " so and so or bearer on demand" from recovering on the document. This suggestion was followed and given effect to by the Judicial Commissioner of Sind in the case of *Dhangi G. Desmanay* v. *Taylor* (3). The full report is not available, but the case is quoted in Indian Cases, Vol. 7, p. 604. The learned Judge apparently held that neither the consideration nor the object of the agreement was unlawful. Farren, J., in his remarks had admitted that in an English case, *Attorney-General* v. *Birkbeck* (4), a contrary opinion had been held by the Court of Queen's Bench, but the report of that case is not available. The Lower Burma case cited in the lower Courts however clearly held that the contract was one forbidden by law, and that consequently, the plaintiff could not recover upon it, and another English case, *Bensley* v. *Bignold* (5), was cited as authority for this view. The report of this lastmentioned case is not available. But it appears to me that the provisions of S. 23, Contract Act, are clearly against the plaintiff-appellant. The consideration for the loan of Rs. 1,000 or for the plaintiff-apppellant's forbearing to sue for an old debt of Rs. 1,000, whichever it may be, is the defendant-respondent's promise to pay Rs. 1,000 on demand to the plaintiff-appellant or order or bearer, and that promise being, as I have just held, in contravention of S. 24, Paper Currency Act, it is forbidden by law. The entire agreement, therefore is void as expressly declared in the last clause of S. 23, Contract Act.

Next, it is contended on behalf of the plaintiff-appellant that S. 120, Negotiable Instrument Act, debarred the defendent-respondent from pleading that the document was void. On this point S. 120 is confined to suits by a holder in due course, and as far as I can understand a holder in due course does not include the payee of a negotiable instrument payable to bearer. Apart from this moreover it seems to me that, on the face of the promissory note in question, the Courts are bound to take judicial notice of the provisions of S. 24, Paper Currency Act, without the defendant-respondent having raised the objection in his defence at all: S. 57 (1), Evidedce Act.

(1) [1910] 5 L. B. R. 191=8 I. C. 962.
(2) [1892] 16 Bom. 689.
(3)]1910] 4 S. L. R. 44=7 I. C. 604.
(4) [1884]. 12 Q. B. D. 605=53 L. J. Q. B. 378=51 L. T. 199=32 W. R. 905.
(5) 5 B. & Ald. 335=24 R. R. 401=106 E. R. 1214.

The last point raised is that apart from the promissory note, the plaintiff-appellant was entitled to a decree on the original consideration. This question was exhaustively dealt with in *Nga Waik* v. *Ng Chet* (6). The conclusion there come to was that where a loan exists independently of the bill or note, that is, where a promissory note is executed for a debt which aleady exists, the plaintiff can succeed on the original consideration. In the present case, it was admitted on both sides in the plaint and written statement that the defendant-respondent borrowed money from the plaintiff-appellant years before the execution of the promissory note in question on interest and paid prinicipal and interest on account, leaving a balance of Rs. 1,000 at the time of execution of the promissory note in question. Provided the plaintiff-appellant's suit was within limitation, he was therefore entitled to a decree apart from the promissory note. This matter was not gone into.

The decrees of the lower Courts are set aside, and it is directed that the case be remanded to the Court of first instance under O. 41, R. 23, read with O. 42 in order that the Court may go into the question of the plaintiff-appellant's claim on the original consideration and come to a fresh decision apart from the promissory note. The plaintiff appellant should, at the outset, be allowed to amend his plaint by the addition of a prayer for a decree on the original consideration, and any allegations of facts on which he may rely for his contention that the suit is within time. Costs will abide the final result.

A certificate will be granted to the plaintiff-appellant under S. 13, Court-fees Act.

K.N./R.K. *Decree set aside; suit remanded.*

(6) [1907-08] U. B. R. third Quarter, Evidence 5.

A. I. R. 1914 Upper Burma 5 (1)

SAUNDERS, A. J. C.

Emperor—Prosecutor.

v.

Nga Nyo and *others*—Accused.

Criminal Revn. No. 569 of 1913, Decided on 15th August 1913.

Burma Village Act (1907), S. 19—Proof of building house without permission after Act is necessary for conviction.

To justify a conviction under S. 19 (1), it is necessary to show that the accused had built his house without the permission of the Deputy Commissioner, and later than the year 1908, in which year the Act came into force.

[P 5 C 2]

Judgment. — The conviction under S. 19 (1), Village Act, is not justified by the evidence. It was necessary to show that the accused had built their houses without the permission of the Deputy Commissioner and later than the year 1908 in which year the present village Act came into force. The old village regulation did not contain any provisions corresponding to the terms of S. 18 of the present Village Act. The Magistrate states that the houses have been in existence, he thinks, eight or nine years.

The convictions and sentences are set aside and the fines must be refunded. If the prosecution can prove that an offence has been committed, there may be a new trial, but the accused should be tried separately.

K.N./R.K. *Conviction set aside.*

A. I. R. 1914 Upper Burma 5 (2)

SHAW, J. C.

Jugaram—Applicant.

v.

Nga Tun Baw—Opposite Party.

Criminal Revn. No. 88 of 1914, Decided on 9th June 1914.

Workmen's Breach of Contract Act (13 of 1859), S. 2—Employer stopping work and making settlement for repayment—Act ceases to apply for any breach.

If an employer tells his workman not to do any more work and arrives at a settlement with him for the repayment of the balance due, the case is taken out of the Workmen's Breach of Contract Act, the liability of the workman becomes purely a civil liability and his failure to act on the settlement cannot bring the case back under the Act : 4 *L. B. R.* 365, *Dist.*

[P 6 C 1]

L. K. Mitter—for Applicant.

Judgment.—The District Magistrate has submitted the proceedings in this case for orders in revision, being of opinion that the Subdivisional Magistrate misunderstood the Workmen's Breach of Contract Act and the Contract Act.

After perusing the record I agree with the learned District Magistrate.

The complainant called no witnesses. On the other hand there was evidence, which the Magistrate believed, on the side of the respondent, Tun Baw, to the effect that complainant told respondent not to do any more work but to repay the balance, and that a settlement was

arrived at by which complainant accepted a pony and other things in part payment and agreed to waive Rs. 60, leaving a balance of Rs. 100 for which respondent mortgaged and promised to make delivery of a piece of land worth Rs. 60 and to pay Rs. 40 in Nayon 1276.

Respondent would seem to have failed to deliver the land as promised. But I do not think that failure brings the case back under the Workmen's Breach of Contract Act. By his own act complainant, in my opinion, took it out of the Act when he told respondent to do no more work, and after that and after the settlement the respondent's liability was purely a civil liability : cf. *In the matter of Anusoori Sanyasi* (1).

The Subdivisional Magistrate relied upon the Lower Burma case of *A. L. M. S. Subramanian Chetty* v. *Gangaya* (2). But that was not a case under the Workmen's Breach of Contract Act and therefore cannot be taken as an authority for applying the Workmen's Breach of Contract Act in the circumstances of the present case.

The order of the Subdivisional Magistrate is set aside and the complaint is dismissed. If the complainant wishes to take proceedings for the recovery of the balance due to him, he must go to the civil Court.

K.N /R.K. *Order set aside.*

(1) [1905] 28 Mad. 37=1 Weir 671=2 Cr. L.J. 149.
(2) [1907-08] 4 L.B.R. 365.

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* A. I. R. 1914 Upper Burma 6

MCCOLL, A. J. C.

Nga Po Thin—Appellant.

v.

U Thi Hla—Respondent.

Second Appeal No. 273 of 1912, Decided on 15th September 1913.

***(a) Civil P. C. (5 of 1908), S. 9—Suit for possession of monastery is cognizable.**

A suit between a layman and a Buddhist monk in regard to land on which a monastery stands is cognizable by the civil Courts : (1892-96) 2 *U. B. R.* 59 and (1897-01) 2 *U. B. R.* 42, *Dist.*; 10 *I. C.* 996, *Foll.* [P 7 C 1]

(b) Buddhist Law (Burmese)—Ecclesiastical —Monk is competent to hold property and can act as owner—Property dedicated personally is not transferable—Monastery is sanghika and not poggalika.

Buddist monks at the present day do and may possess property : (1892-96) 2 *U. B. R.* 78, *Diss. from.* [P 8 C 2]

A monk can act as owner of a monastery whether dedicated to him personally by the Kyaungtaga or allotted to him by other monks for 12 years at most, but he cannot accrding to the Vinaya, give away to an individual, either a monk or a layman, a monastery dedicated to him personally. Such a monastery is sanghika property and cannot be poggalika: *P. J. L. B.* 614, *Diss from.* [P 9 C 2]

Poggalika property is such as a monk can dispose of as he thinks fit.

(c) Buddhist Law—Ecclesiastical — Appropriation by one monk of property of another when valid stated.

If a monk takes the property of another monk and appropriates it to his own use, the appropriation is valid and is called a withathagaha gift, provided (according to the Vinaya) five conditions are fulfilled, viz., (1) the monks must be intimate; (2) they must have associated together; (3) they must have spoken about the property ; (4) the owner must be alive when the property is taken and (5) the taker must know that the owner would be pleased at the taking. [P 10 C 2]

J. C. Chatterjee—for Appellant.

San Wa—for Respondent.

Judgment.—This is a case of very considerable difficulty, as it involves questions of the Buddhist Ecclesiastical law.

Section 9, Civil P. C,, lays down that the civil Courts shall have jusisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. And in the explanation to that section a suit in which the right to property is contested is declared to be a suit of a civil nature notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

In *U Te Za* v. *U Pyinna* (1), which was a suit between Buddhist monks relating to a kyaung-taik, it was held that according to the custom in force before the annexation, such disputes were decided by the Ecclesiastical authorities, that the Hlutdaw never interfered with such decisions but, on the contrary, lent its aid to enforce them, that the rights which the Ecclesiastical authorites had acquired remained to them after the annexation and that the civil Courts should adopt the same practice as the Hlutdaw had followed.

In *U Thatdama* v. *U. Meda* (2) it was held that not only should the civil Courts be bound by the decisions of the ecclesiastical authorities in matters within their competence, but they should also abstain from deciding points which fall within the sphere of ecclesiastical

(1) [1892-96] 2 U. B. R. 59.
(2) [1897-01] 2 U. B. R. 42.

jurisdication. In these two cases all the parties were Buddhist monks.

U Teik Ka v. *Nga Tin Byu* (3) was a case in which a layman had brought a dispute between him and three monks before the Thathanabaing, and having obtaiued an order in his favour applied to the civil Court to enforce it. It was contended in that case that as the plaintiff was a layman the ecclesiastical authorities had no jurisdiction. But it was held that as the Thathanabaing's order was a pronouncement on the religious duties of monks towards the descendants of a taga and was directed against subordinate ecclesiastics, it was an order within the Thathanabaing's competence and should be enforced.

This is clearly not an authority for holding that in a dispute between a layman and a monk the ordinary jurisdiction of the civil Courts is ousted and a layman-plaintiff must submit to the jurisdiction of the ecclesiastical authorities. In the present case, the plaintiff who is a layman did not do so but brought a suit in a civil Court for trial on the merits, the defendant-respondent who is a monk raised no objection to the jurisdiction of the civil Courts, and though the property in suit was admittedly at any rate once religious property I am of opinion that the Township Court had jurisdiction to try the suit on the merits.

The plaintiff-appellant's case is that the land in suit on which a monastery stands was the poggalika property of a monk, U Ariza, that a monk, U Pandawa who was U Ariza's pupil, obtained it as a withathagaha gift and had subsequently given it to him. He sued for possession.

The defendant-respondent U Thi Hla who is living in the monastery standing on the land, raised two inconsistent defences, namely: (1) that he and U Pandawa took the land and kyaung as a withathagaha gift jointly and that U Pandawa subsequently made a gift of his interest to defendant-respondent, and (2) that on the death of U Ariza the property reverted to the original donor who again gave it to the defendant-respondent as his poggalika property.

The Township Judge found in plaintiff-appellant's favour and gave him a decree.

The lower appellate Court found on the authority of *Maung Hmon* v. *U Cho* (4) that a monk can dispose of his poggalika property during his lifetime, but that if he fails to do so it reverts te the donor who can select a successor but that if he fails to do so it becomes thingika property; but he went on and found that the land in suit had become thingika and therefore could not be the subject of a gift. He accordingly set aside the decree of the first Court and dismissed the suit.

The learned Additonal Judge obviously quoted a ruling without referring to it. The ruling cited by him has no bearing on the point at all. Possibly he referred to Tha Gywe's Treatise on Buddhist Law p. 239, and quoted the ruling he did by mistake for *Maung On Gain* v. *U Pandisa* (5) quoted a few lines lower down on the same page.

The first thing to consider is the principle on which the case should be decided. If the Dhammathats be referred to, it will be found that they are hopelessly contradictory and they are also inconsistent with the rules in the Vinaya. Thus in Vol. 1, U Gaung's Digest, p. 464, the compiler says: "The rules laid down in the old Dhammathats are inconsistent with those in the Vinaya and an attempt has been made in the present treatise to reconcile them, and readers are requested to exercise their own discretion in their application of the rules."

The rule laid down in *Maung On Gain* v. *U Pandisa* (5), referred to by the lower appellate Court is contained in S. 410: "Property (including a monastery) given to a specified rahan shall on the death of the original donee revert to tbe donor who shall be at liberty to again give it away as a charitable gift to whomsoever he likes."

But the rule given in S. 405 is diametrically the opposite: "If a deceased rahan did not transfer his poggalika monastery to anyone it shall become sanghika property . . . . . .

"The donor has no voice in the selection of a successor to the original donee, right to select being exercised by the members of the order."

Again, in S. 399 a gift made by a rahan to take effect after his death is declared to be invalid, whilst in S. 404

(3) [1910] 1 U. B. R. 78=10 I. C. 996.

(4) [1892-96] 2 U. B. R. 397.

(5) P. J. L. B. 614.

the gift of a poggalika monastery made by a dying rahan is declared to be valid.

The questions which arise for decision in this case are such as would be better decided by the ecclesiastical authorities, but as I have found that the civil Courts have jurisdiction to try this case, those questions must be decided, and I think the proper basis for the decision should be the texts of the Vinaya so far as they can properly be applied.

It might be objected .that the Vinaya is at least three hundred years older than the Christian era, that law is progressive and that it would be as absurd to apply the rules contained in the Vinaya to modern conditions as to apply the law of mortgage contained in Leviticus to a dispute between Christians. But the cases are widely different. Christians do not profess to be bound in their disputes about property by either the Old or the New Testament. Whereas though no doubt the strict rules contained in the Vinaya are departed from by many monks, there are other monks who try to conform to them as well as the times will permit, and all monks profess to be bound by them ; and when a case of this nature is brought before the ecclesiastical authorities for decision, it is in accordance with texts from the Vinaya that they decided it : vide *U Te Za* v. *U Pyinnya* (1).

Now the questions for decision are :

(1) Can a monastery or land be the subject of a poggalika gift ?

(2) If so, is .the recipient monk competent to give it away either to another monk or to anyone else ?

(3) Was there a valid Withathagaha gift from U Ariza to U Pandawa ?

(4) Was there a valid gift from U Pandawa to the plaintiff-appellant ?

If the plaintiff-appellant is to succeed all these points must be decided in his favour.

In *Maung Talok* v. *Ma Kun* (6) the lower appellate Court held that "looking to the accepted precepts of the Buddhist religion, it seemed evident that pongyis could not own poggalika property, and at most could only have a usufruct in such things as gardens, etc., for the purpose of obtaining by means of their produce those few things lawful to be possessed." It was held however by this Court that whatever may have been the primitive rules of Buddhism, Buddhist monks at the present day do and may possess property. But the authorities on which that decision was based were the Dhammathats which are not the authorities on which the ecclesiastical authorities themselves decide these matters.

No doubt the proposition that a monastery cannot be poggalika property will sound novel, but nevertheless I have been unable to find any authority in the Vinaya—and I have spent a very considerable amount of .time in the quest—for the opposite proposition, though some of the Dhammathats assume that a monastery can be poggalika property ; and in *Maung On Gaing* v. *U Pandisa* (5) and in others cases the Courts have followed these Dhammathats.

It would appear that originally the monks lived in the woods and forests and caves and anywhere they could get shelter as buildings and not been expressly allowed them, and when a rich man offered to build some dwelling houses for certain monks, they refused lest they should commit a sin. The matter was referred to the Buddha and he said : "I allow you, O Bhikkus, abodes of five kinds — viharas, addhagogas, storeyed buildings, attics and caves." A vihara is clearly used over and over again in the Vinaya as equivalent for what is now known as a kyaung. The rich man thereupon built sixty viharas and asked the Buddha what he was to do with them. The latter replied : "Then O householder, dedicate these sixty dwelling places to the sangha of the four directions, whether now present or hereafter to arrive." This story is given in the Kullavagga, Book 6 Ch. I, Ss. 2, 3 and 4, and clearly indicates that at the beginning, at any rate, dwellings dedicated as monasteries were to form the common property of the whole body of Buddhist monks.

It is perhaps worthy of note that apparently the first if not the only mention in the Vinaya of a garden (arranna) given as a religious offering was dedicated to "the fraternity of Bhikkus with the Buddha at its head" (Mahavagga, Book 1, Ch. 22, S. 18).

When the people knew that monasteries were permitted they began to build with zeal, and a poor tailor who wished to gain merit in this way, but had not

(6) [1892-96] 2 U. B. R. 78.

the necessary skill, on finding that his building kept tumbling down before it was completed complained that whereas the monks taught others, no one taught him or helped him to build. When the Buddha heard of this he said: "I permit you, O Bhikkus, to give new buildings in course of erection in charge to a Bhikku who shall superintend the work": Kullavagga, Book 6, Ch. 5. Next we find that this permission was taken advantage of by monks who wished to defeat what I consider was the plain rule, viz., that a monastery was not to be considered the property of an individual monk, and buildings which were practically completed and required nothing but a little plaster or the socket for a bolt were given in charge to individual monks and the charge was assigned for 20 or 30 years or for life. The stricter monks objected and the Buddha was informed, and he forbade the practice and fixed as the limit of time during which a Bhikku might superintend the building of a vihara as 12 years: Kullavagga, Book 6, Ch. 17, S. 1.

It is true that it is possible to read these passages having reference only to monasteries dedicated as sanghika property, but, on the other hand, they are perfectly consistent with the proposition that monasteries cannot be other than sanghika property. But S. 3 of the same chapter seems to me to make the matter clearer. The question for the decision of the Buddha was what was to be done in case a monk in charge of building operations left the place or became incompetent by leaving the priesthood or otherwise, and he decided thus: "In case that occurs, O Bhikkus, as soon as he has taken charge, or before the building has been completed, let the office be given to another lest there should be loss to the sangha In case the building has been completed, O Bhikkus, if he then leaves the place, it (the office and its privileges) is still his, if he then returns to the world or dies or admits that he is a samanera or that he has abandoned the precepts, or that he has been guilty of an extreme offence, the sangha becomes the owner." In their notes to this passage, Messrs. Rhys Davids and Hermann Oldenberg, from whose translation of the Vinaya these texts have been quoted, say that what is meant is that the monk in charge loses his special privileges, such as his lien on the best sleeping places, etc.

This passage appears to me to include buildings dedicated to an individual monk because, if a sanghika kyaung only were referred to, it is difficult to see how any loss could be caused to the sangha owing to the owner's abandoning it. Reading these passages together it seems to me that a monk could act as owner of a monastery whether dedicated to him personally by the kyaungtaga or allotted to him by other monks for 12 years at most. But whether this be so or not, I think it is clear from other texts, which I shall now refer to, that a monk cannot according to the Vinaya give away to an individual, either monk or layman, a monastery dedicated to him personally.

The proposition that a monk can dispose of property received as a poggalika gift as he thinks fit appears to rest on a saying of the Buddha recorded in the Kullavagga, Book 10, Ch. 15, S. 1: "I allow you, O Bhikkus, to give away that which was given to special individuals." But this saying must be taken with the context. The story runs that the people gave food to the Bhikkus and the Bhikkus gave it to the Bhikkunis (or nuns). The people murmured, saying: "How can their reverences give away to others what was given for them to have, as if we did not know how to make gifts." When the Buddha heard of this he said: "A Bhikku, O Bhikkus, is not to give away to others what was given for them themselves to have. Whosoever does so shall be guilty of a dukkata." Clearly this is the general rule, but an exception was allowed.

"Now at that time the Bhikkus had come into the possession of some food. They told this matter to the Blessed One.

"I allow you, O Bhikkus, to give it to the sangha."

Too much came into their possession. They told this matter to the Blessed One.

"I allow you, O Bhikkus, to give away that which was given to special individuals."

"I allow food that has been stored up to be enjoyed by Bhikkunis after they have had it given over to them by the Bhikkhus."

This is an authority for the giving away of such a thing as food by a monk

to whom it has been given as a poggalika gift to another monk or to a nun, but it is very far from being an authority for the proposition that a monk to whom individually a monastery or land has been given can give the same away to a layman. But there are other texts which, I think, are conclusive.

The Kullavagga, Book 6, Ch. 15, relates how certain monks were consequently worried by other monks from distant places claiming sleeping accommodation in their monastery, and how they tried to remedy matters by handing over all the sleeping accommodation to one of their number as his own property. This would, of course, be converting sanghika property into poggalika property which is obviously against the rules (for an exception however, vide Mahavagga, Book 8, Ch. 24, S. 4), but when the Buddha heard of it, he went much further than forbidding this, he said: "These five things, O Bhikkus, are untransferable, and are not to be disposed of either by the sangha, or by a gana, (a group of monks), or by a single individual. And what are the five? A park (aranna) or the site for a park..... A vihara or site for a vihara--this is the second untransferable thing, that cannot be disposed of by the sangha or by a gana or by an individual. If it be disposed of, such disposal is void and whosoever disposed of it, is guilty of a thuthakkaya....." This passage is repeated in Ch. 16, S. 2, with the word "divide" in place of the word "transfer" on the occasion of some monks dividing all the sleeping accommodations in a monastery amongst themselves, and it clearly has reference to the different kinds of religious gifts that may be made, mentioned in Mahavagga, Book 8, Ch. 32, of which three only may be mentioned, viz., a gift to the sangha, a gift to a specified number of monks (a gana) and a gift to an individual monk.

The distinction between such property as a monastery or land and the few requisites of a monk is again made clear by the Buddha's directions as to the disposal of a monk's property after his death given in the Mahavagga, Book 8, Ch. 27, S. 5. Now at that time a certain Bhikku who was possessed of much property and .of a plentiful supply of a Bhikku's requisites completed his time. They told this matter to the Blessed One.

"On the death of a Bhikku, O Bhikkus, the sangha becomes the owner of his bowl and of his robes. But now, those who wait upon the sick are of much service. I prescribe, O Bhikkus, that the set of robes and the bowl are to be assigned by the sangha to them who have waited upon the sick. And whatever little property and small supply of a Bhikku's requisites there may be (lahubhan), that is to be divided by the sangha that are present there; but whatever large quantity of property and large supply of a Bhuikku's requisites there may be (grubhan), that is not to be given away and not to be apportioned but to belong to the sangha of the four directions, those who have come in and those who have not."

Thus I think, it is extremely probable that the Buddha refused to allow a monk to own a monastery for more than 12 years and considered it the property of the general body of monks throughout the world, whatever the intention of the donor may have been, and that it is quite certain that he forbade the giving away of a monastery whether it has been dedicated to an individual or not.

It thus becomes unnecessary to consider the alleged withathagaha gift, but I will add that even if it had reference to such poggalika property as a monk can dispose of in his lifetime, the appropriation would have been invalid.

A withathagaha gift is described in the Mahavagga, Book 8, Ch. 19, and in S. 400 of U Gaung's Digest; but in the latter the rules are somewhat different.

If a monk takes the property of another monk and appropriates it to his own use, the appropriation is valid and is called a withathagaha gift, provided (according to the Vinaya) five conditions are fulfilled, viz. (1) the monks must be intimate; (2) they must have associated together; (3) they must have spoken about the property; (4) the owner must be alive when the property is taken and (5) the taker must know that the owner would be pleased at the taking.

It was in connexion with a linen cloth deposited with one monk by another and appropriated by the former that the Buddha pronounced this rule, which is clearly a sensible one and refers to property of little value, because if an inti-

mate friend appropriated property of large value, he could not be sure that the owner would be pleased.

In the present case when U Ariza was dying and was lying insensible, some of the monks living in the kyaung told U Pandawa to take the kyaung and land as a withathagaha, so as to prevent its becoming sanghika property. They frankly admit this. There was thus an endeavour to evade the rules by which they were bound by a pharisaical attempt to adhere to the letter of the law whilst breaking it in spirit. But as a matter of fact, they also broke the letter of the law. Three and possibly four of the necessary conditions were fulfilled, but as U Ariza was on point of death and insensible, he was incapable of being either glad or sorry at the appropriation, which by the way was one in name only, and if U Ariza had not been on his death bed insensible, there is no reason to suppose that he would have been pleased at being deprived of his kyaung and land. The plaintiff appellant's suit thus fails completely and the appeal is accordingly dismissed with costs.

K.N./R.K. *Appeal dismissed.*

A. I. R 1914 Upper Burma 11 (1)

SHAW, J. C.

Katan—Applicant.

v.

Nga Tin and *another*—Opposite Party.

Criminal Misc. Case No. 16 of 1913, Decided on 5th February 1914.

Criminal P. C. (5 of 1898), S. 195 (6)—Sanction should not be revoked without notice to other side.

An application for the revocation of a sanction granted by the lower Court should not be disposed of ex parte without giving notice to the person obtaining sanction or to the District Magistrate. [P 11 C 2]

J. N. Basu—for Applicant.

Maung Sa—for Opposite Party.

Order.—On the application of the present applicant, Katan, the Additional Magistrate granted sanction to him to prosecute respondents, Nga Tin and Nga Saung, under S. 193, I. P. C. The Sessions Court on the application of Nga Saung revoked the sanction granted, without giving notice either to the present applicant or to the District Magistrate. This kind of ex parte proceeding is opposed to general principles; and there is also special authority for holding that notice is necessary in proceedings under Cl. 6, S. 195, Criminal P. C.: cf. *Ram Nath Chammar* v. *Ram Saran Lall* (1) and *Raghubir Singh* v. *Jogeshwar Tewary* (2). It is true that in *Jhalan Jha* v. *Bucha Gope* (3) it was held that notice was not necessary to the party who had obtained sanction in an application for revocation, but notice in that case had been issued to the District Magistrate. In cases of this kind as well as in other cases, I think it is desirable that both sides should be heard. Only in this way can it be expected that orders will meet with satisfaction.

I set aside the order of the Sessions Judge revoking sanction and direct that he proceed to dispose of the application after giving notice to the present applicant.

K.N./R.K. *Order set aside.*

(1) [1897] 1 C. W. N. 529.
(2) [1904] 8 C. W. N. 643=1 Cr. L. J. 632.
(3) [1904] 31 Cal. 811=1 Cr. L. J. 850.

A. I. R. 1914 Upper Burma 11 (2)

SHAW, J. C.

Nga Chok—Appellant.

v.

Mi Pwa On—Respondent.

First Appeal No. 409 of 1914, Decided on 4th February 1914.

(a) Provincial Insolvency Act (3 of 1907), Ss. 11 and 43—Omission to mention property in list under S. 11 is concealment within S. 43.

Where an insolvent, in the schedule of property attached to his application under S. 11 made no mention of the property in question:

Held: that in omitting to mention it he fraudulently or vexatiously concealed the property within the meaning of S. 43 (2) (b) of the Act. [P 12 C 1]

(b) Provincial Insolvency Act (3 of 1907), S. 43—Transfer includes sale, mortgage or gift.

The word "transfer" in S. 43 means what a transfer is defined to be in the Transfer of Property Act, e.g, a sale, a mortgage, or a gift. [P 12 C 1]

Mitter—for Appellant.

R. K. Banerjee—for Respondent.

Judgment.—This is an appeal against an order under S. 43 (2), Provincial Insolvency Act, sentencing appellant to two months' simple imprisonment on the ground of having "transferred" fraudulently certain property which was in his possession at the time he was arrested before he applied to be declared an insolvent. The only witness he had who was able to give any evidence about the property in question was his sister-in-law, and from her statements I think it

is clear that the appellant had an interest in the property or, as the learned Judge of the District Court said, it was his in part. She said that she and her mother and her sister, the appellant's wife, and appellant carried on business together. They lived and worked together. She had her stall in the Yegyo and her sister outside, and they shared profits. Sometimes they sold goods in Mandalay, and sometimes they went about to other places selling. The particular goods in question were being taken by appellant to his mother-in-law who was at Sinbyugyun, and they were to be sold at any festivals there might be. Appellant was to help to sell these things, and he would share the profits.

I do not understand the learned Judge's use of the word "transfer." There was no transfer of the property. Appellant with his brother was taking the goods to Sinbyugyun on the steamer when he was arrested, and he made them over to his brother to take to their destination when he had to leave the steamer at Myingyan with the bailiff's peon. A transfer means what a transfer is defined to be in the Transfer of Property Act, e.g., a sale, a mortgage, or a gift.

But the appellant, in the schedule of property attached to his application under S. 11, Provincial Insolvency Act, made no mention of the property in question, and I think it must be inferred that in omitting to mention it he fraudulently or vexatiously concealed the property within the meaning of S. 43 (2) (b). He did not make any attempt to conceal the property at the time of his arrest, (compare the peon's statement that first he said: "What am I to do with the goods"), and at his examination on 13th June in cross-examination he admitted that he was taking the goods to his parents-in-law at Sinbyugyun and that he was going to sell them. But he represented that they belonged to his sister-in-law or his parents-in-law and that he had no interest in them. which as I have found, was not true.

It has been urged on appellant's behalf that having parted with the property before the presentation of his petition he was under no obligation to mention it in his schedule, that property transferred before petition is dealt with under S. 36 and that S. 43 (2) does not contemplate transfers concealments, etc., made before presentation of petition. But, as I have said already, there was no transfer and the concealment was made at and after the presentation of the petition.

Exception has also been taken to the procedure of the District Court in "making it a rule" in all cases to give creditors an opportunity of showing bad faith, etc., in view of the Lower Burma decision in *Tun Ya* v. *Subbaya Pillay* (1). It has been asserted that this Lower Burma ruling conflicts with *Mi Bu* v. *Nga Po Saung* (2), but I do not think it does. It appears rather to supplement the lastmentioned decision. No attempt has been made to show that it is incorrect, and in my opinion it is consistent with the provisions of the Act. It follows therefore that the procedure of the District Court cannot be justly objected to.

The concealment of property by a debtor applying for a declaration of insolvency is a serious matter, and the sentence of two months' simple imprisonment cannot be regarded as excessive.

The appeal is dismissed with costs. Costs two gold mohurs.

K.N./K.K. *Appeal dismissed.*

(1) [1913] 6 L. B. R. 146=18 I. C. 500.
(2) [1911] 1 U. B. R. 84=11 I. C. 743.

A. I. R. 1914 Upper Burma 12

SHAW, J. C.

Hodgkinson Lack — Plaintiff—Applicant.

v.

P. Gallagher — Defendant — Respondent.

Civil Revision No. 6 of 1914, Decided on 17th June 1914.

Contract Act (9 of 1872), Ss. 9 and 70 — Court can fix reasonable remuneration to medical man even though no fees fixed.

In the absence of an express agreement for payment of fees a medical man is entitled to a reasonable remuneration to be fixed by the Court. [P 14 C 1]

R. G. Aiyangar — for Applicant.

Judgment.—Plaintiff applicant, who is the Civil Surgeon of Bhamo, sued to recover Rs. 32, being his fees for two professional visits to the defendant-respondent's wife.

The Small Cause Court gave him a decree for Rs. 4 only and directed that this sum should be paid by monthly instalments of Rs. 2 and further the Court refused the plaintiff-applicant costs.

The Judge relied upon a case, *Rawlins* v. *Daniel* (1), quoted in Woodman's Digest where it was held that (under the circumstances of that particular case) one-fifth of the monthly income of the defendant was the fair amount to which the plaintiff was entitled for his professional attendance on the family of the defendant (who was a public servant) for a year.

The Judge also held that plaintiff-applicant was not entitled to claim fees for his second visit, because he made it without being specially summoned and as the plaintiff applicant said, in the ordinary course of his work to see how how his patient was progressing ; that the plaintiff applicant was not justified in refussing Rs. 10 which were sent to him by money order, and that his conduct in attempting to charge the defendant-respondent's family individually was most reprehensible. The plaintiff applicant admitted that he refused to accept a money order for Rs. 10 sent by defendant-respondent's wife, and that when defendant-respondent objected to the charge made for the second visit and begged the plaintiff.applicant to reduce his claim on the ground of defendant-respondent's small income, he wrote a letter to defendant-respondent pointing out that on the occasion of both visits he was asked to attend to a child, and enclosing "modified bill" charging Rs. 32 more for attendance on the child or Rs. 64 in all, and he explained that he sent the modified bill merely to show defendant-respondent that the first bill was not excessive.

The defendant-respondent apparently did not file a written statement, but the Judge examined him at the first hearing, and he then admitted that no fees had been mentioned between plaintiff-applicant and him and said that his salary was Rs. 80 a month, that his mother, wife and child were dependent on him; and that he wished to pay by small instalments ; in other words, he did not deny his liability, or dispute the correctness of the amount which the plaintiff applicant claimed.

The Agra case quoted in Woodman's Digest cannot be followed here. The full report of it is available. The case was decided by the old High Court of Agra between 1866 and 1868. There is no means of knowing what sum the plaintiff claimed or what the defendant's income was ; the claim may have been for thousands of rupees and the defendant's monthly salary may have been in four figures. But we do know that remuneration for a year's attendance was claimed, and that was not at all what plaintiff-applicant sued for in the present case. The only point of resemblance would seem to have been that no agreement had been come to expressly about the fees to be paid, and consequently it fell to the Court to give the plaintiff a decree for a reasonable sum. A contract of this kind is what is called an "implied" contract, where the implication is of fact. It is not an "implied" contract which is a legal fiction a "constructive" contract or "quasi" contract, the class of cases referred to in Ss. 68 to 72, Contract Act ; it is a real contract where the promises are not expressed in words but are to be gathered from the conduct of the parties and the surrounding circumstances. This decription of contract is also spoken of in the book as an "inferred" or "tacit" contract. An instance given is that of a customer eating something exhibited for sale in a shop, say a pastry cook's shop. There is an implied or inferred promise on the part of the shopkeeper to sell the article to the customer for the notified price or a reasonable price, and there is an implied or inferred promise on the part of the customer to pay the notified price or a reasonable price : see Addison on Contract, Edn. 10 pp. 412 seqq., Pollock on Contract, Edn. pp. 11 seqq., also S. 9, Contract Act, and Cunningham and Shephard's and Pollock's Notes to that section.

Cunninghan and Shephard in their commentary on S. 9, Contract Act says ; "Where a relation exists between two parties which involves the performance of certain duties by one of them and the payment of reward to him by the other, the law implies a promise by each party to do what is to be done by him."

Pollock in his Notes on the same section says : 'There is a class of cases of considerable importance in England, where parties are presumed to have contracted with tacit reference to some usage well known in the district or in the trade, and whatever is prescribed by that usage becomes an additional term

(1) [1867] 2 Agra H C. R. 56.

of the contract, if not contrary to the general law or excluded by express agreement. Such terms are certainly implied as resulting not from words used, but from a general interpretation of the transaction with reference to the usual understanding of persons entering on like transactions in like circumstances."

In reality the present case perhaps fell within this class. But no usage was actually alleged or proved, by which medical officers in the position of the plaintiff-applicant are in the habit of charging Rs. 16 a visit.

The decision therefore had to go on the general principles before explained.

The question was whether the sum which plaintiff-applicant claimed was reasonable. The Judge of the lower Court, assuming the decision in *Rawlins* v. *Daniel* (1) to lay down a general rule calculated the proper fee for a visit in the present case to be 1 anna 3 pies, but he saw himself that such charge for one or two visits would be inadequate. A medical officer in the position of plaintiff-applicant is a technical expert who has gone through a long and expensive course of training and obtained diplomas implying a high degree of professional skill and knowledge, and his services therefore are deserving of substantial remuneration. A sum of Rs. 4 for a visit was in my opinion, almost as inadequate here as 1 anna 3 pies would have been. I consider that plaintiff-applicant's claim of Rs. 16 per visit was not only reasonable, but ordinary and moderate.

In England claims by medical practitioners are dealt with under the Medical Acts and the by-laws framed by professional Colleges. Here there are no Medical Acts. The Government might, no doubt, lay down rules as to the fees which medical officers in its service should charge to paying patients, but except in regard to Chiefs of Native States it has not done so. On the contrary, in para. 152 of the Medical Manual it is expressly declared that all questions which may arise regarding the amount of remuneration for professional services will be left to private adjustment.

Paragraphs 150 and 151 of the same Manual enjoin upon medical officers to come to a clear understanding when first called in about fees, but direct them to respond unhesitatingly when called upon and to leave the question of fees for consideration after the first visit,

Paragraph 150 also says that in the absence of a special agreement on the basis of a yearly payment it shall be fair to assume that a medical officer's professional sevices will be paid for by the visit.

Here the plaintiff-applicant disregarded the injunction to arrive at an understanding when first called in or after the first visit. But he did what the same rule declares to be proper in charging by the visit.

In paying a second visit and charging for it, although not specially summoned again I think that plaintiff-applicant was acting in accordance with what everybody knows to be the general practice of medical men, and that he was fully justified in doing so.

I do not thtnk that plaintiff-applicant's letter enclosing the modified bill was in very good taste or displayed the kindness and consideration which one is accustomed to meet with in dealing with the family doctor.

I also do not think that the plaintiff applicant ought to have refused the Rs. 10 that were sent him. The fact that the money order was sent by defendant-respondent's wife was not a good reason for refusing to accept it ; it was accompanied too by a promise of Rs. 10 or more next month.

But I do not consider that these circumstances were sufficient to justify the Court in refusing costs to the plaintiff applicant.

He was under no obligation to accept a part payment, and the fact that he only claimed Rs. 32 showed his explanation of the "modified bill" to be correct.

The Judge's remarks on plaintiff-applicant's conduct were unduly severe.

In overlooking the fact that the defendant-respondent did not dispute the correctness of plaintiff-applicant's claim and in reducing the amount claimed to Rs. 4 on the authority of *Rawlins* v. *Daniel* (1) the Judge of the Small Cause Court, in my opinion, failed duly to consider either the fact or the law and was therefore guilty of illegality or material irregularity, and his judgment was not in accordance with law.

The decree of the lower Court is set aside. Defendant-respondent will pay Rs. 32 to plaintiff-applicant with costs.

He may pay by monthly instalments of Rs. 10.

The money order and the promise accompanying it show that defendant-respondent can afford to pay Rs. 10 a month.

K.N./R.K. *Decree set aside.*

A. I. R. 1914 Upper Burma 15 (1)

SHAW, J. C.

Emperor

v.

Ah Pein Shok

Criminal Revn. No. 68 of 1914, Decided on 14th February 1914.

Opium Act (1 of 1878), S. 9 (c)—Possession of three tolas of beinchi by non-Burman is allowed by rules of 1910.

The Opium Rules, 1910, include beinchi in what is there called "defined opium" and allow the possession of such opium by a non-Burman up to three tolas in weight if bought by him from a licensed vendor.

The ruling in (1892-96) 1 *U. B. R.* 133, no longer applies. [P 15 C 1]

Judgment.—Accused, Ah Pein Shok, a Chinaman, has been convicted under S. 9 (c), Opium Act, and sentenced to pay a fine of Rs. 10 or in default to suffer 15 days' rigorous imprisonment for being in possession of one-eighth of a tola of beinchi. The Magistrate said that the possession of beinchi had been ruled to be illegal. The Upper Burma ruling to this effect is *Queen-Empress* v. *Thila* (1). It dates from 1892 and refers to the rules in force at that time and previous rules. The present rules are the Opium Rules, 1910. These are different. They include beinchi in what is there called "defined opium" and allow the possession of such opium by a non-Burman up to three tolas in weight if bought by him from a licensed vendor, see R. 11. The ruling in *Queen-Empress* v. *Thila* (1) therefora no longer applies.

A similar case in Lower Burma was dealt with in *King-Emperor* v. *On Bu* (2).

The conviction and sentence are set aside, and it is ordered that the fine be refunded.

K.N./R.K. *Order set aside.*

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(1) [1892-96] I. U. B. R. 133.
(2) [1907-08] 4 L. B. R. 132=7 Cr. L. J. 410.

A. I. R. 1914 Upper Burma 15 (2)

SHAW, J. C.

Ramchandra—Applicant.

v.

Latchman Pillay—Respondent.

Civil Revn. Petn. No. 209 of 1913, Decided on 19th October 1914.

(a) Civil P. C. (5 of 1908), S. 63 and O. 21, R. 52 — Money in the hands of Court of another district cannot be attached.

It is illegal for a Court to attach money lying in the hands of Court in another district. The proper procedure for a decree-holder in such a case is to have his decree transferred to the Court in that district for execution. [P 16 C 1]

(b) Civil P. C. (5 of 1908), S. 73 — Money attached before judgment is liable to rateable distribution.

Money attached before judgment in case is liable to rateable distribution in execution of decrees aganist the same defendant. [P 16 C 1]

A. C. Mukerji—for Applicant.

J. C. Chatterji—for Respondent.

Order.—The facts were as follows: Applicant instituted a suit against one Po Hlaing on 19th March 1912 in the Township Court, Pyinmana, and while it was pending, namely on 7th May 1912, he applied, citing O. 39, R. 1, for the issue of a temporary injunction restraining the defendant from drawing Rs. 500 belonging to him in possession of the Bombay Burma Trading Corpcration. The Township Court immediately granted a temporary injunction in the old form prescribed for temporary injunctions under S. 492, Civil P. C., 1882, prohibiting the Bombay Burma Corporation's agent from paying Rs. 500 to the defendant. On 16th July 1912 the Township Court allowed the defendant to draw the money on his giving security. On 4th March 1913 the Court passed a decree in favour of the applicant, and on the 8th April 1913, applicant applied for execution, that is, he applied that the sureties might be ordered to pay Rs. 500 into Court (with a view to the decree money and costs being disbursed to him). On 21st July 1913 the sureties deposited the amount of the decree and costs, Rs. 477-15-0, in the Court. In the meanwhile, namely on 21st January 1913, the respondent who had obtained a decree against the same defendant in 1908 in the Subdivisional Court, Yamethin, applied to that Court for the attachment of the Rs. 500 just mentioned as being in the Township Court, Pyinmana, and the Subdivisional Court, Yamethin, granted an attachment accordingly under O. 21, R. 52, requesting the Township

Court, Pyinmana, to make a rateable distribution. The Township Court accordingly, when the sureties had paid in Rs. 477-15-0, proceeded to distribute this sum rateably between the two decree-holders.

The applicant now comes here in revision raising various objections of illegality or material irregularity. The principal objection is that the Subdivisional Court, Yamethin, acted illegally and without jurisdiction in attaching money in the Township Court, Pyinmana. There seems to be no doubt that the Subdivisional Court, Yamethin, was not empowered to make this attachment. What the Court ought to have done was to tell the respondent that if he wished an attachment in execution made in Pyinmana, he must apply to have his decree transferred to Pyinmana. The result of the Subdivisional Court, Yamethin's illegal procedure was that the Township Court, Pyinmana, acted illegally in giving effect to the respondent's attachment.

I do not think that the other objections raised call for particular notice. The Township Court seems to have satisfied itself that the respondent's application was not barred by limitation and O. 21, R. 52, expressly laid upon the Township Court the duty of distributing the money, if it was to be distributed.

It has been admitted before me on both sides that from the time when the defendant Po Hlaing was allowed to draw the Rs. 500 from the Bombay Burma Trading Corporation on security, that money must be taken to have been virtually in deposit in the Township Court. The case therefore was one to which O. 21, R. 52, applied and not S. 63.

Again while the applicant, no doubt, ought to have applied for an attachment before judgment and not a temporary injunction, he actually applied for a temporary injunction and the Court granted him a temporary injunction and not an attachment before judgment. The money in Court therefore was not actually under attachment by the applicant at the time when it was (illegally) attached by the Subdivisional Court, Yamethin, at the instance of the respondent. I think it must be considered to have been assets within the meaning of S. 73. The case of *Sorabji* v. *Kala Raghunath* (1), to which the learned advocate for the applicant has referred, is distinguishable. In that case the judgment-debtor paid into Court the amount of the decree money for payment to his decree-holder, a step which ipso facto involved the withdrawal of a previous attachment. O. 21, R. 55: It was accordingly held that the money having been paid into Court for a particular purpose must be applied to that purpose and could not be regarded as assets available for the distribution. In the present case, the money was the money of the judgment-debtor which was in deposit in Court, but not under attachment, and not expressly for the purpose of paying the applicant's decree since at the date of the respondent's attachment there was no decree yet in existence in favour of the applicant.

The question then is simply, whether I ought to interfere in revision on the ground of the illegal procedure of the Subdivisional Court, Yamethin. It was held under the section of the old Code corresponding to O. 21, R. 52, that an order of distribution made under that section was not final, and that it was open to an aggrieved party to file a regular suit. see the commentaries: Such a procedure would be similar to that expressly provided in S. 73.

On consideration I am of opinion that the lower Courts' proceedings being marked by illegality, it is open to this Court to interfere under S. 115, Civil P. C., although possibly the applicant might have instituted a regular suit. The procedure by way of a regular guit is open to the aggrieved party in a case where the lower Courts have not committed any illegality or material irregularity.

It has been contended on behalf of the respondent that the Subdivisional Court, Yamethin's attachment was a mere technical error, but that is not the view which is taken of proceedings without jurisdiction, and the illegality in question consisted of making an attachment without jurisdiction, that is, on property situated outside the local jurisdiction of the Court. The respondent is an agent of a Chetty firm who ought to be perfectly well acquainted with matters of

(1) [1912] 36 Bom. 156=12 I. C. 911=13 Bom. L. R. 1193.

this kind. He must indeed be well aware that if he wishes to execute a decree beyond the local jurisdiction of the Court which passed it, his proper course is to apply for the transfer of the decree. I cannot therefore regard the respondent as in any way entitled to sympathy.

The order of the Township Court giving respondent a share of the money in question is set aside, and it is directed that the respondent repay the amount to the applicant, and also pay the applicant's costs, two gold mohurs.

K.N./R.K. *Order set aside.*

A. I. R. 1914 Upper Burma 17

McCOLL, A. J. C.

Bhai Khan—Applicant.

v.

Des Raj—Respondent.

Civil Revn. No. 92 of 1913, Decided on 25th June 1914.

(a) Civil P. C. (5 of 1908), O. 38, R. 5—Property outside jurisdiction cannot be attached.

A civil Court has no power to issue a warrant of attachment before judgment on property situated without its jurisdiction: 8 *B. H. C. R.* (*O. C. J.*) 29, *Appr.* [P 18 C 1]

(b) Interpretation of Statutes—Legislative proceedings cannot be referred.

A Court is not justified in referring to the proceedings of the legislature, which resulted in the passing of an Act, as an aid to the construction of any of its provisions. [P 18 C 1]

A. C. Mukerjee—for Applicant.

J. N. Basu—for Respondent.

Judgment.—The question for decision in this application is whether a civil Court has power to issue a warrant of attachment before judgment on property situated without its jurisdiction.

In *Kin Kin* v. *Nga Kyaw We* (1) it was held that Courts had not this power under the Code of 1882, but the learned District Judge has held that there has been an alteration of the law.

The words "within the jurisdiction of the Court" which appeared in S. 483 of the Code of 1882 have been omitted in O. 38, R. 5 of the present Code, and it is urged that as the word "property" is now not qualified in any way, it must include both property within and property without the jurisdiction of the Court, and that the deliberate omission of the words mentioned shows that the legislature intended to alter the law.

But if the matter be gone into a little deeper, this reasoning does not appear to be sound. The word "property" appears in many sections in the Code without any qualification and yet clearly meaning property within the jurisdiction of the Court, e. g., in O. 21, Rr. 11, 12, 21. The legislature have gone back in this respect to the language of the Codes of 1859 and 1877, under which Codes it was held that the property which a Court could attach before judgment was property within its jurisdiction. This was held in *Haji Jiva Nur Mahomed* v. *Abubakar Ibrahim Meman* (2) overruling a previous decision of the same Court to the opposite effect, and the reasons given for the decision appear to me to be very weighty. The learned Chief Judge said: 'Prima facie when we look to enactments relating to the powers of a Court over the property of litigants, we should expect to find those enactments concerned with property, whether it be moveable, or immovable which is situated within their local jurisdiction. Even Courts of equity in England and America which exercise the widest jurisdiction, do not attempt to operate directly in rem when the res is beyond their local jurisdiction, but act in personam only. If the original Court has not power immediately to execute its own decrees in the district of another Court, and execution of them can be only obtained by the intervention of the latter, we should require some very distinct language on the part of the legislature to show that it intended that the Court in which the suit is brought can make or execute any order of attachment before judgment of property situate beyond the local limits of its jurisdiction."

The omission of the words "within the jurisdiction" certainly at first sight make it look as if the legislature did intend to alter the law, but they have reverted to the language of the Civil Procedure Code, 1859, and if it were held that the word "property" included property outside the Court's jurisdiction merely because it was not qualified, the same argument could be applied to other sections in which this word occurs, and the omission of the words "within the jurisdiction" in one section would lead to an interpretation of other sections which certainly was not intended. It is to be noted that the legislature considered it necessary to add to S. 16 of

(1) [1907-09] 2 U. B. R. C. P. C., p. 13.

(2) [1871] 8 B. H. C. R. (O. C. J.) 29.

the present Code an explanation of the word "property" used in that section as property situate in British India." One would have thought that if they intended the word "property" in O. 38, R. 5 to have the same meaning, they would have said so.

It has been urged that the report of the Select Committee on the Civil Procedure Code of 1908 shows clearly that there was an intention to remove the restriction imposed by the words "within the jurisdiction," but the question is rather what the legislature have done than what they intended to do and for this reason it has been held by the Privy Council that a Court is not justified in referring to the proceedings of the legislature, which resulted in the passing of an Act, as an aid to the construction of any of its provisions.

I am of opinion therefore that a Court has not power to attach before judgment property situate beyond the local limits of its jurisdiction.

The order of the District Court, Mandalay, is accordingly set aside with all costs.

Advocate's fee, two gold mohurs.

K.N./R.K. *Order set aside.*

A. I. R. 1914 Upper Burma 18

SAUNDERS, J. C.

Kalima Bibi—Applicant.

v.

Macbul Ahmed—Opposite Party.

Criminal Revision No. 606 of 1913, Decided on 11th September 1913, from order of Subdivisional Magistrate, Mandalay.

Criminal Trial—Stay of—When should criminal trial be stayed if civil suit is pending stated.

It is ordinarily not desirable that when the parties to two proceedings, civil and criminal, are substantially the same and the prosecution before the Magistrate is but a private prosecution and the issues in the two Courts are substantially identical, that both the cases should go on at one and the same time.

Where the issues between the parties are not absolutely identical, but it is clear that if the accused who is the plaintiff in the civil suit succeeds in that suit, the prosecution which is private must fall to the ground, the rule will apply and the prosecution should be stayed.

[P 19 C 1]

D. Dutt—for Applicant.

S. Mukerji—for Opposite Party.

Judgment.—One Macbul Ahmed, alleging that he was married to one Kalima Bibi, lodged a complaint in the Court of the Western Subdivisional Magistrate, Mandalay, in the first instance against four persons, the first of whom, Rahman Ali, was charged under S. 497, I. P. C., with having committed adultery with his wife, and the other three accused with abetting accused 1. He subsequently filed a second complaint in which he charged the same persons and also his wife under S. 491, I. P. C., with having committed bigamy, and with abetment of the same. The Magistrate examined the complainant and issued process, but not so far examined any witnesses. Accused Kalima Bibi has now applied to this Court to stay criminal proceedings on the ground that she had filed a suit in the District Court, Mandalay, against the complainant Macbul Ahmed for recovery of her dower and also for maintenance for the period of iddat, on the ground that after her marriage with Macbul Ahmed she had been divorced, and her case is that she went through the form of marriage with Rahman Ali, accused 1 in the criminal case, after divorce, and that therefore no offence was committed by the parties to that marriage.

An application was also filed before the Western Subdivisional Magistrate praying for stay of the proceedings upon the grounds now set forth in this Court, but the Magistrate declined to grant the application.

There are several Indian authorities upon the subject the general tenor of which appears to be that it is not generally a good ground for adjourning criminal proceedings, that there are proceedings pending in a civil Court for determination of issues similar to those arising in the criminal Court. Note No. 3 to 344, p. 741, 7th Edn. of Sohoni's Code of Criminal Procedure, may be referred to and the cases of *Brojobashi Panda* v. *Emperor* (1) and *Dwarka Nath Rai Chowdhry* v. *Emperor* (2) have been quoted. In the former case the High Court refused to interfere partly on the ground that the criminal Court had come to the conclusion after an inquiry that there were grounds for starting criminal proceedings, while in the latter case the prosecution of the accused had been directed by the District Judge as the result of proceedings which had taken place in the District Court, so

(1) [1909] 4 I. C. 485.
(2) [1904] 31 Cal. 858.

that in both these cases the prosecution was not a private prosecution. In the present case the prosecution has not been instituted by order of the Court, but is entirely a private matter between the parties. But in the second case quoted the Judges quoted with approval the remarks in the judgment in the case of *Raj Kumari Debi* v. *Bama Sundari Debi* (3) that "the discretion should ordinarily be left to the Magistrate either to stay proceedings or not, as he, in the circumstances of the case, may think it right and proper." But at the same time the learned Judge remarked that "ordinarily it is not desirable, if the parties to the two proceedings are substantially the same and the prosecution before the Magistrate is but a private prosecution, and the issues in the two Courts are substantially identical, that both the cases should go on at one and the same time." And the Judge added that it was open to the Magistrate to put the accused on terms as to appearance or otherwise. I am of opinion that the rule stated in these quotations is sound and that it .should generally be acted upon.

In the present case, it is true that the issues between the parties are not absolutely identical, but if the accused who is the plaintiff in the civil suit succeeds in that suit, it is clear that the present prosecution must fall to the ground. The prosecution is a private prosecution and there appears to be no reason why in the interests of justice it should not be stayed.

I am therefore of opinion that the Subdivisional Magistrate should adjourn criminal proceedings for a reasonable time to enable the accused who is plaintiff in the District Court to prosecute her suit in that Court through to a termination and there will be an order accordingly.

K.N./R.K. *Application granted.*

(3) [1896] 23 Cal. 610.

A. I. R. 1914 Upper Burma 19

MCCOLL, A. J. C.

Nga Pi and *another* — Defendants—Appellants.

v.

Nga Kyan Tha — Plaintiff—Respondent.

Second Appeal No. 387 of 1912.

Riparian Rights—Riparian proprietor can take any amount of water for ordinary purposes but for irrigation he must take only reasonable quantity unless he acquires right by prescription.

For ordinary purposes such as for drinking, washing and so on a riparian proprietor may take as much water as really requires for the purpose, even though he may seriously diminish the quantity available for the proprietors below him, but for purposes for irrigation he can only take a reasonable amount and what is a reasonable amount must be decided according to the particular circumstances of each case. [P 20 C 1, 2]

Where it was found that the defendants-appellants took the whole of the water that reached their land for irrigating purposes and thus completely cut off the water from the plaintiff-respondent's land:

Held: that they were not entitled to take the whole of the water unless they had acquired such a right by prescription. [P 21 C 1]

C. G. S. Pillai—for Appellants.

Dutt—for Respondent.

Judgment.—The plaintiff-respondent sued defendants-appellants for damages for having dammed a natural watercourse flowing through his land, so as to prevent any water from reaching it. He alleged that he had suffered damages to extent of Rs. 300. He apparently based his claim not only on his natural right but also on prescription. He alleged that for 30 years the whole of the water in the stream flowed into his land and was penned up on it by a large dam and that the defendants-appellants, whose lands are above his, irrigated their lands with the surplus water which flowed on to them owing to its being thus penned back if there was sufficient rain, but that in 1274 they had erected a dam above his land which stopped the flow completely.

The defendants-appellants contended that they had erected the dam yearly from the time of their grandfathers and that it was owing to drought and not to this dam that the plaintiff-respondent was unable to work his land in 1274. Apparently the argument was that if there had been a greater flow, water would have reached plaintiff-respondent's land in spite of the dam because the defendant-appellant admitted when giving evidence that had he not dammed the stream, the plaintiff-respondent would have got about 100 baskets of paddy from his land in spite of the drought.

The Courts below found that the defendants-appellants had not acquired a prescriptive right to rect the dam and

awarded the plaintiff-respondent Rs. 300 damages.

The defendants-appellants have now appealed to this Court on various grounds. The first ground is that the lower appellate Court erred in procedure in not duly considering that it is customary to erect bunds and that there are in fact several such bunds above the appellant's land and that these bunds had to be made for the purpose of supplying water to the lands above plaintiff-respondent's land owing to the scarcity of water.

This raises the whole question of the rights in a natural stream of the owners of the lands through which it flows. In Alexander's Case Law on Torts the author says: "The natural rights possessed by each successive riparian proprietor in a natural water-course is a right to use the water and pass it on. He has no right to pen back the water or divert it or the like, unless he has acquired that right by an easement inconsistent with the natural right." This is too sweeping a statement and is in fact incorrect.

In *Miner* v. *Gilmour* (1) Lord Kingsdown said: "By the genral law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and his cattle, and this without regard to the effect which such use may have, in a case of deficiency, upon proprietors lower down the stream. But further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him.

"Subject to this condition he may dam up the stream for the purpose of a mill or divert the water for the purpose of irrigation.

"But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury."

Thus for ordinary purposes such as for drinking, washing and so on, a riparian proprietor may take as much water as he really requires for the purpose, even though he may seriously diminish thes quantity available for the proprietor, below him; but for the purpose of irrigation he can only take a reasonable amount, and what is a reasonable amount must be decided according to the particular circumstances of each case.

In *Swindon Waterworks* v. *Wilts and Berks Canal Navigation Co.* (2) it was held that in order to make the extraordinary use of water a reasonable use, the exhaustion of water which thereby takes place must be so inconsiderable as not to form a subject of complaint by the lower riparian proprietor and the water must be restored after the object of irrigation or other work is answered in a volume substantially equal to that in which it passed before.

In *Perumal* v. *Ramasami Chetty* (3) it was held that riparian proprietors are entitled to use and consume the water of the stream which their land adjoins for drinking and household purposes, for watering their cattle, for irrigating their land, and for purposes of manufacture subject to the conditions that the use is reasonable, that it is required for purposes as owners of the land and that it does not destroy or render useless or materially diminish or affect the application of the water by lower riparian proprietors in the exercise of their rights. This case was followed in *Tha E* v. *Lon Ma Gale* (4). In *Debi Pershad Singh* v. *Jaynath Singh* (5) their Lordships of the Privy Council said: "The right claimed by the appellants. . . . . .is neither more nor less than a right on the part of an upper proprietor to dam back a river running through his land and to impound as much of its water as he may find convenient for the purposes of irrigation, leaving only the surplus, if any, for the use of the proprietors below. In the absence of a right acquired by contract with the lower heritors, or by prescriptive use, the law concedes no such right. The common law right of a proprietor, in the position of the appellants, is to take and use for the purpose of irrigation so much only of the water of the stream as can be abstracted with-

(1) [1858-59] 12 Moore P. C. 131=3 L. T. 98=7 W. R. 328=14 E. R. 861=124 R. R. 3.

(2) [1859] 7 H. L. 697=45 L. J. Ch. 638=33 L. T. 513=24 W. R. 284.

(3) [1888] 11 Mad. 16.

(4) [1905-06] 3 L. B. R. 23.

(5) [1897] 24 Cal. 865=24 I. A. 60=1 C. W. N. 401 (P.C.).

out materially diminishing the quantity which is allowed to descend for the use of riparian proprietors below, and without impairing its quality. What quantity of water can be abstracted and consumed without infringing that essential condition, must in all cases be a question of circumstances, depending mainly upon the size of the river or stream, and the proportion which the water abstracted bears to its entire volume."

In the present case the defendants-appellants took the whole of the water that reached their land, and it was for not ordinary purposes only but for irrigating their lands; but it has been urged that it was necessary to erect their dam as otherwise they would have been unable to work their lands and that the dam was only 3 feet long and 2-1/2 feet high. Whatever its size, however this dam completely cut off the water from the plaintiff-respondent's land and whether this was the only way in which they could irrigate their lands or not, I think it is clear from the cases cited above that they were not entitled to take the whole of the water, unless they had acquired such a right by prescription, even if the water in the stream was so little that though of use to the defendants-appellants, it would have been of no use at all for irrigation purposes to the plaintiff-reepondent, which was admittedly not the case. The defendants-appellants not only prevented the plaintiff-respondent from using the water for extraordinary purposes—and he had as much right to use it for such purposes as the defendants-appellants—but by their extraordinary use of it they deprived the plaintiff-respondent of his right to use the water for ordinary purposes.

The Courts below have found that the defendants-appellants had not acquired a right to erect the dam by prescription and though the second ground of appeal is that the lower appellate Court disbelieved the witnesses for the defence for inadequate reasons, I agree that defendants-appellants failed to prove that they had acquired the right they claimed. It is not even clear whether their case was that they erected a dam every year; whether there was much rain or little; or whether they only erected one when rain was scarce, and they had to prove that for 20 years they had peaceably and openly enjoyed the use of the water as an easement. Now the enjoyment of all the water would have been an easement because it would have been an act done in derogation of plaintiff-respondent's rights, but the enjoyment of the water as a natural right and that is how the defendants-appellants appear to have enjoyed the water previously—cannot support a claim to the user of it as an easement: *Chunilal* v. *Mangaldas* (6). Nothing less than proof that the defendants-appellants had deprived the plaintiff-respondent of the whole of the water every year for 20 years could establish the right they claim. The dam is clearly not of a permanent nature and its building could not be an invasion of plaintiff-respondent's rights until the volume of water entering his land was sensibly diminished. It is not the erection of the dam on defendants-appellants' own land or rather in the bed of the stream that constitutes the invasion of plaintiff-respondent's right, but the stopping of the water. The defendants-appellants certainly did not prove that they had deprived the plaintiff-respondent of the use of the water every year for 20 years.

The third ground of appeal need not be discussed. It was not for the plaintiff-respondent to prove that he had a prescriptive right to the use of the water; he had a natural right to it; it was for the defendants-appellants to prove that they had by prescription acquired the right to deprive the plaintiff-respondent of the water.

The last ground of appeal is that the Courts below erred in fixing the damages at Rs. 300 without allowing for expenses of cultivation and in taking the value of paddy at Rs. 150 a hundred baskets without any evidence, and it has been urged that the whole damage has not been done by the defendant-appellant as there are several dams above his. On the last point I would say that it has not been shown that these other riparian proprietors have taken more than a reasonable quantity of water, and in the second place, if they too have commited a tort, the general rule is that joint tortfeasors are jointly and severally liable.

(6) [1892] 16 Bom. 592.

As regards the actual damages caused, plaintiff-appellant's witness Mg. Po Lat should have been a valuable witness as he is a revenue surveyor, but he declined to make any statement on the point. The lower appellate Court assumed that the damage caused was to the value of 200 baskets of paddy because plaintiff-respondent's land ordinarily grew that amount. But it is clear that it was a bad year with little rain. It is possible that nevertheless the plaintiff-respondents would have received sufficient water to raise the usual crop but for defendants-appellant's dam, but this has not been proved and cannot be assumed especially as the defendants-appellants were entitled to take a reasonable proportion of the water for their own lands. It was for the plaintiff-respondent to prove the amount of damage which he had suffered, and I do not consider that he proved that he could have raised 200 baskets of paddy that year. The amount admitted by defendants-appellants will be taken, viz., 100 baskets.

As the defendants-appellants did not deny that the value of 100 baskets was Rs. 150, the Courts below were right in taking it at that amount, but the expenses of cultivation should have been allowed for. They may be put down at a third.

I accordingly modify the decree of the Courts below into a decree for Rs. 100 with costs on that amount in the Courts below. There will be no order as to the costs incurred in this Court.

K.N./R.K. *Decree modified.*

A. I. R. 1914 Upper Burma 22

SHAW, J. C.

Emperor

v.

Mi Mein Gale—Opposite party.

Criminal Revision No. 23 of 1914, Decided on 23rd March 1914.

Penal Code (45 of 1860), S. 317—Child thrown in bush by mother—Mother held guilty under S. 317.

Where a woman, immediately after giving birth to an illegitimate child and throwing it into a thorn-bush, walked nearly a mile and a half, gave a false account of her condition to her companions, dispensed with any assistance even after she reached home, denied having given birth to a child when questioned by the headman next morning and never asked after the child's welfare at any time or showed any solicitude on the subject:

Held: that the woman was guilty of an offence under S. 317. [P 23 C 1]

Judgment.—Mi Mein Gale, the accused in this case, was a woman of 20. The Sessions Judge described her as powerfully built, but repulsive-looking and of a low type. He noted that according to the evidence she was perfectly sane and that on her trial she displayed undoubted sagacity in defending herself. She had never been married, but had had one child two years before, and she was charged here with causing the death of another child she had just given birth to and abandoning it.

The Sessions Court found her not guilty of murder and culpable homicide (Ss. 302 and 304, I. P. C.), but convicted her of leaving the child in a bush by the roadside, with the intention of wholly abandoning it (S. 317, I. P. C.), and sentenced her to five years' rigorous imprisonment.

The Sessions Judge referred to an unpublished decision of this Court *Mi Ma* v. *Emperor* (1)* as having afforded him much help. Cases of the kind are rare in Upper Burma, but they do occur, and the information collected in *Mi Ma* v. *Emperor* (1), from Lyon's and Taylor's Works on Medical Jurisprudence on points which commonly arise when women are charged with causing the death of their children or abandoning them, is no doubt likely to be of assistance to Magistrates and Sessions Judges. A copy of the judgement is therefore attached. There were many circumstances which combined to make it doubtful if Mi Ma was guilty of any criminal offence.

Here the facts were different. The accused was not a primipara. The position in which the child was found showed that she must have deliberately thrown it into a thorn-bush without regard for its safety or comfort. Making all allowance for the condition of a woman delivering herself away from help, it is difficult to reconcile this conduct with any intention, but that of abandoning the child wholly, and this inference is confirmed by her subsequent conduct.

She was unusually strong, she walked nearly a mile and half immediately after giving birth to the child and throwing it into the thorn-bush, and, although displaying signs of distress, was able to give a false account of her condition to

(1) Criminal Appeal No. 20 of 1906.

*This judgment is printed at the end of this case.

her companions and to dispense with any assistance even after she reached home. She also denied having given birth to a child when she was questioned by the headman next morning, and she never asked after the child's welfare at any time, or showed any solicitude on the subject.

I am of opinion that the learned Sessions Judge was right in finding the accused guilty under S. 317, I. P. C. In acquitting her on the charges of murder and culpable homicide he went, as far as the evidence justified him in going, in her favour. The punishment was by no means excessive. She has not appealed and I have dealt with the case in revision. There is no ground for interference.

The proceedings are returned.

K.N./R.K. *Revision rejected.*

Criminal Appeal No. 20 *of* 1906.

Judgment.—Appellant Mi Ma, an unmarried girl of 16, has been convicted under S. 317, I. P. C., and sentenced by the Sessions Court to seven years' rigorous imprisonment.

On 22nd August last, appellant gave birth to a child in the jungle, close behind the hut of a tari climber named Nga Pu. She covered it with some palm leaves and walked home, a distance of 350 yards (or nearly 1/5th of a mile). Almost immediately Nga Pu heard the child cry, and went to where it was lying. He then left it in charge of another tari climber, and ran to the village to report to the headman, telling everybody he met on the way. One of the persons he told was Mi Dinga, appellant's aunt, who at once suspected appellant and went to her father's house and asked her if the child was hers. By this time appellant had been received by her step-mother, Mi Lan, and was being attended to by her and an aunt, Mi Gyan Tha. These women had suspected what had happened when they saw her come in weak and perspiring, and had taken her to her room; and almost immediately, as I gather from the statements of the witnesses, Nga Pu had arrived with the report of what he had found. Appellant is the headman's daughter. Mi Lan and Mi Gyan Tha hearing the report asked appellant if this was her child. She answered that it was, and begged them to go and fetch it. Next, Mi Dinga arrived and asked the same question, and appellant made the same reply. All these incidents seem to have succeeded one another at very short intervals. The child was brought home promptly and properly attended to. It seemed to be in good health and lived till the 26th. On that day, in the morning, it was attacked by what the Burmese call "child's disease," and died in the afternoon. The death was at once reported to the police and the body sent to the hospital. The Hospital Assistant examined it the same day. His evidence is that the skull bones in two places were depressed and pressing on the brain, injuries likely to cause death in four or five hours. He also found a scratch, and what he supposed to be finger-marks, on the neck. The learned Sessions Judge refused to accept this evidence as sufficient to support a charge of murder, but he held that it gave a much more serious complexion to the case as tending to show that appellant had not done her best for the child. He thought that in leaving the child in the jungle and walking home without any attempt to send for it, she must have intended to abandon it wholly, and that her treatment of it probably accelerated its death.

The witnesses deny that there were any marks of injury on the child, and say that it suffered from nothing but "child's disease" or fits.

I am unable to detect in the evidence any trace of annoyance or displeasure on account of the child's existence in any of the appellant's relations.

In the circumstances detailed above the probability of anyone deliberately doing the child to death by injuring its head or squeezing its throat appears to me to be extremely remote.

The Sessions Judge also took this view.

I have referred to the records of the only two cases of a similar kind to be found in this Court, and I have also examined Lyon's and Taylor's works on Medical Jurisprudence. In the latter I have found what appears to me to be most important and helpful information.

The two previous cases differed considerably from the present.

In the first (see Criminal Appeal No, 62 of 1904 of this Court) the accused was a woman of 24, a Manipuri, who had had two husbands and had born two children

before. She gave birth to a child in the jungle early in the morning and abandoned it in situ, walking home a distance of 350 yards. She said nothing to anybody about it. It was accidentally found dead by a policeman at 7. a. m. One of its eyes had been pecked out by a crow, and it might have suffered from haemorrhage from the navel cord. The mother's defence was that the child was born dead. which was proved to be false. The child was illegitimate, and having regard to all the circumstances, it was held that the accused abandoned the child deliberately with the intention of causing its death, and her conviction under S. 302, I. P. C., was upheld, though the sentence was reduced to transportation for life.

In the second case (see Criminal Appeal No. 108 of 1905 of this Court) the accused was a Burman woman of 26 but recently married, and the child was illegitimate. It was born at home and taken and left in the jungle soon after sunrise, and was found about 4 p. m. the same day, and brought home alive. With care it might have lived. It died of convulsions two days later. The accused had another (illegitimate) child before. She was sentenced to six years' rigorous imprisonment, under S. 317, by the Sessions Court, and the conviction and sentence were upheld.

In the present case we have a young girl of 16, without any previous experience. There is nothing to show that her story is untrue, that she was delivered suddenly and unexpectedly when out gathering palm leaves alone. As I have already remarked no appreciable time seems to have elapsed between her arrival at her father's house and the arrival of Nga Pu with his report, immediately after which appellant confessed that the child was hers.

We have therefore as against her nothing but the facts that she did not get assistance for the child on her way home, that she did not immediately tell her relations what had happened, and that the hospital assistant found at his post mortem examination of the child's body what he believed to be marks of violence deliberately used to cause the death of the child.

The following remarks and information taken from the second volume of Taylor's works, above cited, seem to me to deprive these facts of all value as evidence of appellant's criminal intention. On p. 392 in connexion with the danger of suffocation to a new-born child, we find quoted from W. Hunter: "An unhappy woman, delivered by herself, distracted in her mind and exhausted in her body, will not have strength or recollection enough to fly instantly to the relief of the child" and "a primiparous female may faint or become wholly unconscious of her situation, or if conscious, she may he ignorant of the necessity of removing the child."

Again on p. 398 in connexion with death by drowning in cases of sudden and unassisted delivery:—Alone and unassisted, the mother of an illegitimate child may be placed under circumstances of the greatest suspicion, although innocent of any attempt to destroy the life of her child.

And although cases often occur in which women exhibit a remarkable power of exertion immediately or very soon after delivery, instances are given on p. 407, where it is remarked: "A firm resolution, with a strong desire to conceal her shame, enable a woman to perform immediately after her delivery acts connected with the disposal of the body of her child, which, from ordinary experience, might appear to be much beyond her strength,"—these are exceptions to the general rule.

At pages 406 seqq. Taylor deals with cases of sudden delivery and gives numerous instances, among primiparae as well as other women and says: A woman may be thus suddenly and unexpectedly delivered while in the erect posture, although this is not common among primiparous women, and several injuries may thus be accidentally produced on the head of a child." In such cases the child falls to the ground with or without injury and the umbilical cord is ruptured. Fractures of the skull are rare but may occur (pp. 408, 409), e. g. in one case (of a primipara) the result was a soft tumour two or three inches across on the left parietal bone, slightly ecchymosed, and the child recovered; in another, mentioned as published by Swayne, there was merely the appearance of a bruise on the head, and the cord was ruptured three inches from the navel. "The child did not suffer from the fall and continued well until six

days after its birth, when it was seized with convulsions and died." A fissure one and a half inches long was found in the upper part of the left parietal bone, a clot of blood between the duramater and the bone, and congestion of the vessels of the membranes. In another case death was caused by effusion of blood on the brain, without fracture of the bones of the skull: in another by a large fissure on the right parietal bone with great effusion of blood. Other cases are mentioned of parietal fissures in which the children recovered.

On pp. 402 and 403 cases are dealt with of injury to the head attended with marks of violence, fractures or tumours with effusion of blood from mere uterine pressure, and in one instance death occurred only 23 days after birth.

On p. 413 it is explained that similar injuries may be caused accidentally by the mother in effecting self-delivery.

And Taylor observes on p. 403 that there are no certain signs by which fracture before death can be distinguished from fracture recently after death.

On p. 404 he explains that fractures caused by the expulsive efforts of the uterus are generally slight — merely fissures in the bones beginning at the sutures, and extending for an inch or less.

At p. 329 he says: "In general, when children are murdered, the amount of violence inflicted is considerably greater than that which is required to destroy them—whereby satisfactory proofs are occasionally obtained"; and on p 406: "In cases of murder by violence on the head, the injuries are commonly much more severe than in the case of injuries from uterine pressure. The bones are driven in, the brain protrudes, and the scalp is extensively lacerated."

Then on p. 416 seqq, we have an account of marks simulating violence on the neck, which are accidentally produced.

I may quote finally a remark with which Taylor introduces the subject of infanticide, p. 319: "The strongest motive for destroying the infant appears to be shame or the disgrace of having an iltegitimate child. *The crime is only attempted where pregnancy has not been discovered, and where delivery is effected in concealment.*"

To apply this information to the circumstances of the present case: First the medical witness's description of the head injuries is that there were contused wounds or contusions, one on the sagittal suture three inches by three inches, the bones depressed half an inch and pressing on the brain, but not fractured, the other on the occipetal bone, on the right side of the middle line, two inches by two inches, the bones depressed one-third inch. Externally there was a red circular swelling in each place. It appears to me that in their general features, these injuries resemble those described in Taylor as occurring either from uterine pressure, or from violence in self-delivery, or from the fall in sudden delivery in the erect posture. The medical witness was a hospital assistant of 12 years' service, who had never made a post mortem examination of an infant before. It might have been useful to examine the Civil Surgeon with reference to the Hospital Assistant's descriptions of the injuries, and the injuries referred to in Taylor. Unfortunately this was not done. In the absence of such expert evidence on the point and having regard to all the circumstances, I think that there is a distinct probability that the head injuries were caused accidentally at the time of delivery and that they were not so immediately dangerous as the Hospital Assistant supposed, but led to the child's death after four days: cf. the case from Swayne abovementioned. This view is supported by the evidence of Mi Pwa Su, the first woman who went to the child's assistance. According to her the navel cord was about four inches long and untied, facts consistent with rupture by the fall in delivery in the erect posture. The marks on the neck are described by the Hospital Assistant as a slight scratch and "two reddish depressions one on either side of the throat apparently caused by the pressure of fingers."

These do not differ materially from the marks referred to by Taylor as being often accidentally produced.

It may be noted that the Hospital Assistant's opinions in regard to delivery in the erect posture are shown by Taylor's work to be wrong. It follows that the injury found by the Hospital Assistant cannot be considered as evidence against appellant, even to the

limited extent admitted by the Sessions Court.

And I think it is impossible to infer with reasonable certainty from appellant's failure to seek assistance on her way to the village that she intended to abandon her child. She was not actively doing away with the child. She was not therefore actuated by resolution and other strong feelings which, according to Taylor give abnormal strength to women in such a conjuncture. The exertion of walking 350 yards must have told upon appellant. The evidence showed that she arrived at the house perspiring and unwell. Having regard to the remarks quoted above from W. Hunter, it would be unfair to infer that appellant was guilty from her silence at and before this time. If she had continued to keep silence after she had had time to recover strength and when she was clearly able to speak about what had occurred, the case would be different. But as we have seen, Nga Pu's report was made very shortly after appellant's arrival, and she then admitted, when asked, that the child was hers and begged that it might be sent for. The fact that appellant had concealed her pregnancy cannot be taken into consideration as evidence against her in this case. It proves nothing.

For these reasons I am of opinion that grave doubt exists as to the guilt of the appellant, and I set aside the conviction and sentence and direct that she be acquitted and released.

A. I. R. 1914 Upper Burma 26

SHAW, J. C.

Nga Tun E—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 86 of 1914, Decided on 10th October 1914.

Penal Code (45 of 1860), Ss. 322 and 325—Intention of causing grievous hurt must be judged—If intention is of simple hurt S. 325 cannot apply.

A Magistrate or Court dealing with a charge of voluntarily causing grievous hurt must consider and decide not only whether grievous hurt has been caused, but, if it has been caused, whether the accused intended or knew himself to be likely to cause grievous hurt. If he intended or knew himself to be likely to cause simple hurt only, he cannot be convicted under S. 325.

[P 27 C 1]

J. C. Chatterjee—for Applicant.

Judgment.—Applicant, Tun E, was convicted under S. 325, I. P. C., of voluntarily causing grievous hurt to one Ba Gyaw and was sentenced to six months' rigorous imprisonment and a fine of Rs. 50, or in default, two months' further rigorous imprisonment. The Sessions Court on appeal confirmed the conviction and sentence.

I think the Magistrate was right in finding that applicant struck Ba Gyaw. Two independent witnesses corroborated Ba Gyaw to that extent, and although their statements in some respects were not satisfactory, there was actually no credible evidence to the contrary. The other witnesses, who were present and and were related to the applicant took care not to say how Ba Gyaw came to fall. They must have seen what happened and the only explanation is that applicant struck Ba Gyaw.

The witnesses for the defence were not worthy of credit and it was doubtful whether they were present at all.

The medical witness, the Sub-Assistant Surgeon, stated that the injuries might have been caused by a fall, but he was not questioned precisely as to whether all the injuries could have been caused by one fall. There were actually two contused wounds and one contusion on the back of the head behind the left ear. Assuming it to be possible for all these injuries to have been caused by one fall, this possibility does not nullify the evidence that applicant struck with a stick.

As regards the weapon used, Ba Gyaw said that it was Ex. 1, a "washing-bat" 21-1/2 inches long and from 1 inch to 2 inches wide, weighing 50 tolas. A policeman's trucheon weighs 36 tolas. The stick belonged to the house where the assault took place, but there was no evidence besides Ba 'Gyaw's own statement to show that applicant used this stick.

Mi Thet Su said that applicant struck with a stick, but she could not say what stick it was.

Mi Shwe Mi also implied that a stick was used, but did not say what stick it was.

I do not consider therefore that the Magistrate and the Sessions Court were justified in finding that the weapon which the applicant used was Ex. 1. But if it was used, I still do not con-

sider that it necessarily followed that applicant was liable to punishment under S. 325.

The Magistrate said that the hurt was grievous because the injuries endangered Ba Gyaw's life. But there was no evidence whatever to show that Ba Gyaw's life was endangered. The Magistrate examined the medical witness very imperfectly; he allowed him to say that slight bleeding from the left ear, the left nostril and the mouth and deafness and a discharge of air from the left ear might be due to fracture of the base of the skull. He did not ask him whether such symptoms necessarily implied a fracture of the skull or could be explained otherwise. If the Sub-Assistant Surgeon was unable to express an opinion on this point, the Magistrate ought to have examined the Civil Surgeon who has inspected the injuries and, anyhow could have given an expert opinion on the point whether there was or was not a fracture of the base of the skull. Actually there was no evidence that a fracture was caused and the Sessions Court was not justified in finding that there was a fracture.

Again, assuming that there was a fracture of the skull, this was not sufficient in itself to constitute an offence under S. 325. As I have to point out almost every day to Magistrates and even to Sessions Judges, the provisions of S. 322, I. P. C., are very precise and incapable of misconstruction. A Magistrate or Court dealing with a charge of voluntarily causing grievous hurt must consider and decide not only whether grievous hurt has been caused, but if it has been caused whether the accused intended or knew himself to be likely to cause grievous hurt. If he intended or knew himself to be likely to cause simple hurt only, he cannot be convicted under S. 325. There is nothing to show that the applicant intended to cause grievious hurt, and I do not think that there is sufficient material to justify a finding that he knew himself to be likely to cause grievous hurt even if he used the stick, Ex. 1, which as I have said already, is in my opinion open to doubt.

The conviction is altered to one of voluntarily causing hurt, S. 323, I. P. C.

The applicant suffered two months imprisonment before he was released on bail. The sentence of imprisonment is reduced to the imprisonment already undergone.

K.N./R.K. *Sentence reduced.*

A. I. R. 1914 Upper Burma 27

SHAW, J. C.

Nga Nyun and *others*—Applicants.

v.

Nga Po O—Respondent.

Civil Misc. No. 28 of 1913, Decided on 6th February 1914.

Civil P. C. (5 of 1908), O. 3, R. 2—R. 2 cannot enable unqualified person to make it his business to appear for parties under special powers-of-attorney.

Where an ex-petition writer and ex-apprentice clerk made a business of appearing for parties under cover of special powers-of-attorney and thus practically performed the functions of an advocate and thereby evaded the provisions of the law relating to the appointment of advocates and pleaders; that the provisions of O. 3, R. 2, could not enable an unqualified person to practise as an advocate in spite of the provisions of S. 25, seqq, Upper Burma Civil Courts Regulation.

Held: that, he made himself liable to punishment under S. 26, Upper Burma Civil Courts Regulation: 14 *Cal.* 556, *Foll.* [P 28 C 1]

S. Vasudevan—for Applicants.

S. Mukerjee—for Respondent.

Order.—This is a case of an unusual character and of considerable importance. The applicants are pleaders practising at Kawlin in the Katha District. They complained to the District Judge that the respondent, an expetition writer and ex-apprentice clerk, under cover of special powers-of-attorney was appearing for parties in cases in the Township Court and practising as an advocate. They stated that he sat at the advocates' table and examined and cross-examined witnesses, and cited legal authorities to the Judge, and that the parties were not only resident in Kawlin but also present in Court. The District Judge refused to interfere on the ground that O. 3, R. 2, no longer laid any restrictions on the appointment of attorneys as recognized agents as S. 37, Civil P. C., 1882 had done.

The District Judge was, of course, perfectly right in saying that O. 3, R. 2, no longer imposes any restrictions on the appointment of attorneys to represent parties, but I think he overlooked the fact that O. 3, R. 2, does not

authorise a person to make a business of appearing as an attorney for parties in cases and by means of special powers-of-attorney to evade the provisions of the law relating to the appointment of advocates and pleaders. I think that the allegations of the applicants called for inquiry. If the respondent was making a business of appearing as an attorney for parties and in effect performing the functions of an advocate, I think that he would be liable to punishment under S. 26, Upper Burma Civil Courts Regulation. The case of *Tussuduq Hosain* v. *Girhar Narain* (1), which has been referred to on behalf of the applicants, furnishes, I think, authority for this view. It was there held by a Full Bench of the Calcutta High Court that "If any person other than a duly certificated and enrolled muktear constantly and as a means of livelihood performs any of the functions of a muktear, he practises as muktear, and is liable to a penalty under S. 31, Legal Practitioners Act." It would be absurd if the provisions of O. 3, R. 2, should enable an unqualified person to practise as an advocate in spite of the provisions of S. 25, seqq., Upper Burma Civil Courts Regulation. It appears to me that the question to be determined is one of fact, whether the respondent is evading the provisions of the sections just cited by taking special powers-of-attorney under O. 3, R. 2.

I direct that the District Judge instruct the Judge of the Township Court to inquire with reference to S. 26, Upper Burma Civil Courts Regulation, whether the respondent has been, under cover of speeial powers-of-attorney, appearing, pleading or acting in contravention of the foregoing provisions of Ch. 4, Civil Courts Regulation, or the rules made thereunder, and if he finds that the respondent has done so, to impose a fine under the provisions of the section.

The District Judge is requested to report the result of the further proceedings and to submit the records at the same time.

The respondent will pay the applicants' costs in this application, two gold mohurs.

K.N./R.K. *Further report ordered.*

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(1) [1887] 14 Cal. 556.

A. I. R. 1914 Upper Burma 28

SHAW, J. C.

Ismail—Applicant.

v.

A. H. Nolan—Opposite Party.

Criminal Revn. No 995 of 1914, Decided on 3rd March 1914.

Criminal P. C. (5 of 1898), Ss. 119 and 437 — S. 437 does not apply to proceedings under Ch. 8 — Further inquiry cannot be ordered of person discharged under S. 119 —Notice must be given.

Section 437 does not apply to proceedings under Ch. 8 of the Code.

Therefore a District Magistrate cannot order further inquiry into the case of a person discharged under S. 119, but it is open to him to institute fresh proceedings on entirely fresh materials.

It is proper to give notice to the person discharged before an order for further inquiry is made against him. [P 29 C 1]

L. K. Mitter—for Applicant.

Judgment.—Proceedings were taken against the applicant, Ismail, under S. 3, Burma Opium Law Amendment Act, 1909, before the Western Subdivisional Magistrate who, after taking evidence on both sides, discharged the applicant. The District Magistrate then directed further inquiry to be made before the Eastern Subdivisional Magistrate, holding that the Western Subdivisional Magistrate had "improperly discharged the accused."

I am now asked to interfere in revision on the ground that the District Magistrate's order was illegal. In the circumstances, the District Magistrate might very well have instructed the Government Prosecutor to support his order, but he has not done so.

Proceedings under Ch. 8, Criminal P. C., are of a special character. S. 117 prescribes that where a preliminary order requires security for keeping the peace, the inquiry is to be made as nearly as may be practicable in the manner prescribed for summons cases, and where the order requires security for good behaviour, in the manner prescribed for warrant cases, except that no charge need be framed. In a warrant case, the order which the Western Subdivisional Magistrate would have passed would have been one of acquittal under S. 258, Criminal P. C., but according to S. 119, where it is not proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom

the inquiry is made should execute a bond, the final order which the Magistrate is to make is one of discharge, whatever stage the proceedings may have reached.

Two questions then arise. First whether, assuming S. 437 to be applicable to proceedings under Ch. 8, an order of discharge passed after the evidence for the defence has been taken should be regarded as an order of acquittal; and secondly, whether S. 437 at all applies to proceedings under Ch. 8. On the second point, there are two decisions of the Calcutta High Court, *Queen Empress* v. *Iman Mondal* (1) and *Dayanath Taluqdar* v. *Emperor* (2). The first of these was a precisely similar case to the present, as far as the report shows. In both it was held that S. 437 does not apply to proceedings under Ch. 8; that in S. 437 a complaint means a complaint of an offence, and an accused person who has been discharged, a person who has been accused of an offence. On consideration, it appears to me that this interpretation of S. 437 is correct. Throughout the whole of Ch. 8 it is to be observed that the word "accused" is nowhere used. It is indeed studiously avoided. This fact, coupled with the provisions of S. 119, before referred to, by which in proceedings of this kind the final order must always be one of discharge where a case for requiring security is not made out, is sufficient, in my opinion, to show that the legislature did not intend S. 437 to apply to proceedings under Ch. 8. As pointed out in the Calcutta cases, it is always open to the District Magistrate to institute fresh proceedings on entirely fresh materials.

In the foregoing circumstances, the District Magistrate's order cannot be sustained. In another respect it was open to objection. The District Magistrate made it without giving notice to the applicant, although the propriety of giving notice has been declared in the published rulings of this Court after a consideration of all the High Court decisions on the subject: see *Aung Myat* v. *Queen-Empress* (3) and *Po Gaung* v. *King-Emperor* (4).

(1) [1900] 27 Cal. 662.
(2) [1906] 33 Cal. 8=3 Cr. L. J. 243.
(3) [1897-1901] 1 U. B. R. 900.
(4) [1897-1901] 1 U. B. R. 96.

The District Magistrate's order directing further enquiry is set aside.

K.N./R.K. *Revision allowed.*

A. I. R. 1914 Upper Burma 29

SHAW, J. C.

Nga Myo—Petitioner.

v.

Nga Kyan and *others*—Respondents.

Criminal Revision No. 566 of 1914, Decided on 15th September 1914.

Criminal P. C. (5 of 1898), S. 250—Complaint frivolous or vexatious—If also false application of S. 250 is not barred—Charge of bribing if false is vexatious.

As long as a case is frivolous or vexatious, the fact that it is also false is no bar to the application of S. 250, Criminal P. C.

A charge of bribery may not be frivolous, but, if false, is undoubtedly vexatious. [P 30 C 1]

J. N. Basu—for Applicant.

L. K. Mitter—for Respondents.

Order.—The applicant presented a complaint charging respondent Nga Kyan, a Revenue Surveyor, with having taken a bribe of Rs. 100, and respondents, Aung Tha and Thet Le, with having given this bribe to him.

The District Magistrate framed charges against respondent, Nga Kyan, under S. 161, and the other two respondents under Ss. 161 and 114, I. P. C., but in the end acquitted all three and directed the applicant to pay Rs. 50 to each of them as compensation under S. 250, Criminal P. C. I am asked to interfere in revision on the ground that the order was illegal because the Magistrate found the applicant's charges to be false and because Rs. 50 is the maximum prescribed by the section. A further objection is also taken on the ground that the Magistrate at the same time made an order to the effect that in default of payment, applicant should undergo simple imprisonment for one month.

The last mentioned order was of course wrong as a perusal of Cl, (2), S. 250, is sufficient to show; but as the money has been paid the mistake is immaterial.

As regards the maximum, the learned advocate must have misconstrued Cl. (1) of the section the language of which is quite plain and free from ambiguity. It authorizes a Magistrate to order compensation not exceeding Rs. 50 to be paid to each of the accused where there are more than one.

As regards the first point the subject was fully considered by a Full Bench of the Calcutta High Court in *Beni Madhub*

Kurmi v. *Kumud Kumar Biswas* (1). Four of the five Judges composing the Bench held that as long as a case is frivolous or vexatious, the fact that it is also false is no bar to the application of S. 250. On consideration, I am of opinion that this ruling deserves to be followed. In the present case the charges being of giving and receiving a bribe were not frivolous, but if false, as the Magistrate found, they were undoubtedly vexatious. It is to be noted that S. 250 of the present Code speaks of "frivolous or vexatious" accusations and not as one of the previous Codes had it "frivolous and vexatious."

No objection has been taken in the application to the order of acquittal, and after referring to the proceedings, I am of opinion that no ground has been made out for the interference of this Court in revision with that order.

The application is dismissed.

K.N./R.K. *Application dismissed.*

(1) [1903] 30 Cal. 123=9 C. W. N. 799.

A. I. R. 1914 Upper Burma 30

SAUNDERS, J. C.

Wa Foon—Applicant.

v.

Ma Thein Tin—Opposite Party.

Criminal Revn. No. 504 of 1913, Decided on 11th September 1913.

(a) Criminal P. C. (5 of 1898), S. 488 — Evidence of marriage is essential.

In maintenance proceedings under the Criminal Procedure Code the wife must show that she is the wife of the accused. [P 30 C 2]

(b) Buddhist Law—Marriage—Chinese Buddhist man's law will govern his marriage with Burmese Buddhist woman.

In questions of marriage between a Chinese Buddhist man and a Burmese Buddhist woman, the man's own personal law would be applicable to him.

The marriage laws among the Chinese are considerably more restricted than among the Burmese Buddhists. [P 30 C 2]

S. Vasudeva for *C. G. S. Pillay* — for Applicant.

Judgment. — Applicant, a Burmese woman, claimed maintenance from the respondent on the ground that she was his wife, that he had deserted her and refused to maintain her. The respondent replied that they were not married and he was therefore not bound to maintain the applicant. The respondent claims to be Chinese. From the evidence it appears that his father was a Chinaman and his mother was the daughter of a Chinaman by a Burmese wife. There can be no doubt, I think, that he is justified in claiming that he belonged to that nationality.

The Magistrate has found that he is a Buddhist and according to Buddhist law the parties were married and that he is therefore liable to maintain the petitioner, and has ordered him to pay Rs. 5 a month under S. 488, Criminal P. C. The respondent now applies to this Court to revise the order of the Magistrate.

I think the Magistrate was clearly wrong in confining himself to the question whether the present applicant was a Buddhist or not. If he was a Chinese Buddhist, his own personal law would be applicable to him, and it does not follow that, because living together by mutual consent constitutes a valid marriage among Burmese Buddhists, it does so among all people who profess the Buddhist faith. On the contrary it appears that the marriage laws among the Chinese are considerably more restricted than among the Burmese Buddhists. For instance, on p. 172 of Alabaster's Notes and Commentaries on Chinese Criminal law, it is stated that three conditions are necessary to constitute a valid marriage, the first of these being the consent of the parents of the parties; the consent of the parties themselves being unimportant, the said parties being in fact parties to a contract agreed on by others; certain formalities and ceremonials must be complied with as a second condition; and the third condition is that the respective position of the parties is such that a marriage is not invalid. It is clear that in this case none of these conditions was complied with.

In view of the defence of the respondent (the present applicant), I think, it was for the applicant (the present respondent) who claimed to be his wife to show that she was so.

The question of the law which is applicable in a case of this kind was discussed in the case of *Fone Lan* v. *Ma Gyee* (1) and I think there can be no doubt that the conclusions there arrived at were correct.

I therefore allow this application and set aside the order of the Head-quarters Magistrate.

K.N./R.K. *Application allowed.*

(1) [1903-04] 2 L. B. R. 95.

A. I. R. 1914 Upper Burma 31 (1)

SHAW, J. C.

Nga Saw Ke and *others*—Applicants.

v.

Emperor—Opposite Party.

Criminal Revision No. 102 of 1914, Decided on 23rd June 1914, against sentence of Magistrate, Natmauk, in Cr. Summary Case No. 22 of 1904.

Criminal P. C. (5 of 1898), Ss. 155 and 190 (1) (b)—Police report in noncognizable case if doubted, investigation under S. 155 can be ordered but the officer cannot be examined as complainant—It is a report within S. 190 (1) (b).

When a Magistrate receives a police report in a noncognizable case and has reason for doubting its correctness, he can order an investigation under S. 155, Criminal P. C., but he cannot examine the police officer who submitted the report as if he was a complainant. [P 31, C 2]

A police report in a noncognizable case is a police report within the meaning of S. 190 (1) (b) Criminal P. C: (1904-06) 1 *U. B. R. Cr. Pro.* 25. [P 31 C 2]

H. M. Lutter - for Applicants.

R. G. Aiyanger—for the Crown.

Order.--This case is similar to the one dealt with in Criminal Revision No. 101 of 1914, and three of the accused were convicted in that case, viz., Saw Ke, the house owner, Nga Hme and Nga Te. Here, too, the Magistrate passed sentences of imprisonment without the option of a fine. Saw Ke was,sentenced to three months' rigorous imprisonment under S. 12 (a) for keeping a common gaming house on 9th February 1914.Nga Hme, Ye Gyan and Nyi Bu were sentenced each to two months' rigorous imprisonment under S.11 for gambling on the same occasion at Saw Ke's house, they having been previously convicted. Nga Te was sentenced to one month's rigorous imprisonment under S. 11 for gambling at the same time and place. Nge Hme's previous conviction, as noted in my order in Criminal Revision No. 101, was one under S. 11, dated 19th January 1903, when he was fined Rs. 15. Ye Gyan's convictions were one under Ss. 11 and 12 (sic) on 5th January 1900, when he was fined Rs. 15, and the second under S. 10 on 2nd May 1903, when he was fined again Rs. 15. Nyi Bu was convicted under S. 10 on 3rd August 1904 and fined Rs. 50 and again under Ss. 11 and 12 (sic) on 22nd July 1913, when he was fined Rs. 10.

The gambling in the present case was similar to that in Criminal Revision No. 101; the stakes were Re. 1. Here the Magistrate said: "It appears that accused Saw Ke has been carrying on different kinds of gambling for some time past in the neighbouring villages of Natmauk." But there is nothing to show that there was any evidence to that effect.

The sentence on Saw Ke is reduced to a fine of Rs. 100 with 21 days' rigorous imprisonment in default. The sentence on Nyi Bu is reduced to a fine of Rs. 50 with ten days' rigorous imprisonment in default. The sentences on Ye Gyan, Nga Hme and Nga Te are reduced in each case to a fine of Rs. 30 with seven days' rigorous imprisonment in default.

The Magistrate who first dealt with this case entertained it on a police report by a head constable. He proceeded to examine the head constable on oath as if he was a complainant, and then ordered a police investigation. As explained ten years ago in *Emperor* v. *Nga Thaung* (1) a police report in a noncognizble case is a police report within the meaing of S. 190 (1) (d), Criminal P. C., and there is no authority in the Criminal Procedure Code for examining a police officer submitting a police report under S. 190 (1) (d) as if he was a complainant.

It was however open to the Magistrate to order an investigation under S. 155, and this appears to be the proper course for a Magistrate to take when he receives a police report in a noncognizable case and has reason for doubting its correctness.

K.N./R.K. *Sentences reduced.*

(1) [1904 06] 1 U. B. R. Cr. Pro. 25=1 Cr. L. J. 1047.

A. I. R. 1914 Upper Burma 31 (2)

SHAW, J. C.

Nga Kan Hla—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 162 of 1914, Decided on 29th September 1914.

(a) Penal Code (45 of 1860), S. 84—Mental derangement if not amounting to unsoundness of mind does not affect—Lesser sentence may be justified in case of mental derangement.

The law requires that a man shall be held responsible for his acts although he may be suffering from mental derangement in cases where that mental derangement falls short of the unsoundness of mind described in S. 84 of the Penal Code. [P 33 C 1]

On proof of such mental derangement in a murderer, the lesser sentence may be passed. [P 33 C 2]

(b) Criminal Trial — Sentence — Lesser penalty is not obligatory in murder charge in case of youth—Penal Code (1860), S. 302.

Ordinarily youth is itself an extenuating circumstance, but it does not mean that in every case of murder, where the accused is under a certain age, the lesser penalty must be awarded. [P 33 C 1]

J. N. Basu—for Appellant.

H. M. Lutter—for Respondent.

Order.—Appellant Kan Hla, 17, has been convicted under S. 302, I.P.C., and sentenced by the Sessions Court of Sagaing to death for the murder of Mi Kan Shi, a girl of 15, his betrothed, on 23rd June last at Myintagyi.

The facts really admit of no doubt. There was an eyewitness, Mi Tha Mi, a woman of 36, who was on a tama tree plucking leaves between 300 and 400 yards from the spot, and saw appellant striking the deceased two or three times with some weapon and saw the deceased fall. She swears that she was under no sort of doubt as to the identity of the appellant, and she immediately went to the village and gave information as well as telling people she met on the way.

Appellant was at once searched for, and found at the house of his natural father at Tetkaung. (He lived ordinarily with his adoptive father at Myintagyi). On being arrested by the headman, he confessed to him that he had killed the deceased. On the next day, 24th June, at Yeu, appellant made a full confession to the subdivisional Magistrate which was recorded after the prescribed preliminary inquiry. This preliminary inquiry was not as full or intelligent as it might and ought to have been, but it was sufficient to make the confession admissible.

In the Sessions Court, appellant alleged that he confessed because he was threatened by the Sub-Inspector of Police, Po Hla, and Constable Tha Kun. The Sessions Judge inquired into this allegation and came to the conclusion that it was unfounded and that the confession was voluntary. In this finding I concur.

The appellant in his confession said that he quarrelled with the deceased because she would not go with him to open some water channels and wished that a viper might bite him ; that this enraged him so much that he went to the village (1,100 odd yards distant) and got a dama with which he proceeded to kill the deceased, and that he "did not know what happened to his mind." He delivered several cuts on deceased, one of which severed the head from the body all but a bit of skin, and another penetrated the abdomen and pierced the liver. There can be no doubt that the offence falls within S. 300, and unless any exception general or special applies, amounts to murder punishable under S. 302, I.P.C.

The Sessions Judge referred to *Nga Tha Kin* v. *Emperor* (1), and as I understand his remarks, came to the conclusion that in spite of appellant's age the circumstances of the case were such that he ought to be hanged. He was of opinion that there was no indication whatever of mental unsoundness, that appellant was well developed and normal physically and mentally, and should be held fully responsible.

It is argued on his behalf before me that appellant's story of going to the village for the dama is extremely improbable, on the supposition that appellant was in a normal condition of mind, and was probably untrue, and that if it was true, it argues a serious derangement of mind, the motive for appellant's anger being so trivial and inadequate that if he was a person of really sound mind, he could not have gone all the way to the village and back without cooling down. It is suggested therefore that either appellant made use of a weapon which was ready to his hand on the spot and acted without premeditation and on the spur of the moment in the heat of passion, or else, if he went to the village for the dama, he was the victim of homicidal mania. Reference is made to Lyon's Medical Jurisprudence, Edn. 3, p. 350 seqq., where symptoms of homicidal mania are enumerated, absence of motive absence of any attempt at concealment, absence of accomplices, absence of elaborate perparation, etc., etc., and where cases are given of homicidal mania in which there had been no previous manifestation of mental derangement.

In brief it is not contended that any of the special exceptions applied, and the only general exception touched upon is that contained in S. 84, I. P. C.

With regard to appellant's age the effect of the decision in *Tha Kin's* case (1) above cited was to explain that ordi-

(1) [1911] 1 U. B. R. 87=11 I. C. 792.

narily youth is itself an extenuating circumstance. I do not think that there is any room for misapprehension on this point. At the same time the ruling was not intended to lay down, and it did not lay down, that in every case of murder where the accused is under a certain age, the lesser penalty must be awarded. I am not therefore disposed to hold that the learned Sessions Judge was wrong in the view which he took that the appellant's age was not a sufficient ground for exempting him from the death penalty.

But the question of mental unsoundness remains. Here I think that the contentions of the learned advocate are not without support. There seems to be no reason to doubt the correctness of appellant's statement that he went to the village for the dama. But the case is somewhat similar to the English cases mentioned by Taylor in his Medical Jurisprudence, Edn, 6, Vol. 1, p. 878, and referred to in *Queen-Empress* v. *Lakshman Dagdu* (2), where there was practically nothing to show that the accused was insane except the nature of the crime and the manner in which it was committed. But as pointed out in *Lakshman Dagdu's* case (2), the question of appellant's responsibility must be decided according to the test prescribed in S. 84, I. P. C. As I understand it, the law requires that a man shall be held responsible for his acts, although he may be suffering from mental derangement, in cases where that mental derangement falls short of the unsoundness of mind described in the section. As far as one can judge, the appellant was not incapable of knowing the nature of his act or that it was wrong or contrary to law. He made himself scarce and he did not tell anyone what he had done until he was arrested. He then related what he had done and gave explanations. There have been one or two cases in this Court in which ths same question arose. The last one which I have traced was in many respects a close counterpart of the present. This was *Nga Tin* v. *Emperor*, unreported Criminal Application No. 170 of 1909, decided on 16th November 1909. There the accused, one Nga Tin, aged 17, was convicted and sentenced to death for the murder of his wife Mi Mi. The facts admitted of no doubt. The accused without any apparent reason whatever suddenly picked up a dama and cut his wife with it several times. One cut falling on the throat severed the carotid artery and so caused instant death. The next day the accused made a full confession to the Subdivisional Magistrate in which he said that he "did not know what became of his mind" and that he cut his wife "because his mind had gone astray." According to the evidence, the accused had never exhibited any signs of insanity at any time. I held that there was no ground for ordering further inquiry into the accused's mental condition, and that he was not entitled to be acquitted, but that the case was one where the lesser sentence was sufficient to meet the ends of justice, following in this respect the view taken in *Queen-Empress* v. *Lakshman Dagdu* (2), already cited, and also the later Madras case of *Queen Empress* v. *Venkatasami* (3). It appears to me that the present case calls for a similar finding.

The appellant's conduct suggests that there was present a certain degree of mental unsoundness, although it was not sufficient to bring him within S. 84, I. P. C., and on this ground I am of opinion that the lesser sentence should be passed, apart from the question of his age.

The conviction is maintained and the sentence is reduced to transportation for life.

K.N./R.K. *Sentence altered.*

(2) [1886] 10 Bom. 512.

(3) [1889] 12 Mad. 459=1 Weir 42.

A. I. R. 1914 Upper Burma 33

SHAW, J. C.

Nga Shwe Myo—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 587 of 1914, Decided on 1st December 1914.

Criminal P. C. (5 of 1898), S. 110—Order in respect of sureties must be reasonable and not arbitrary.

In proceedings under S. 110, Criminal P. C., Magistrates must not act arbitrarily, and any restrictions or limitations that they impose on sureties must be reasonable. [P 34 C 2]

L. K. Mitter—for Applicant.

H. M. Lutter—for the Crown.

Judgment.—Applicant, Shwe Myo has been ordered to be bound over under S. 17, Gambling Act, read with S. 110, Criminal P. C., for one year in Rs. 100 with two sureties in the like amount, the

sureties being respectable house-owners of Tebingan.

The applicant offered one surety, Po Min, who lived at Migyaungye, and another surety, Nga Tun, his brother-in-law. The Magistrate rejected the first because he did not live at Tebingan, and the second because he was applicant's brother-in-law.

The applicant seeks the intervention of this Court in revision on two grounds: first, that the evidence recorded was inadmissible, and secondly, that the limitations and restrictions imposed on the sureties and the reasons assigned for rejecting the sureties offered were unauthorized and improper.

On the first point, the Magistrate undoubtedly recorded some evidence that was inadmissible. He has not paid due attention to the distinction explained in *Nga Hok* v. *King-Emperor* (1) and the Calcutta case there cited. But there was ample admissible evidence on the record to justify an order requiring security.

On the second point, the question whether Magistrates are authorized to impose restrictions and limitations on sureties offered under Ss. 107, 109 and 110, Criminal P. C., has formed the subject of several decisions of the Indian High Courts. They are not all quite in agreement on the surface. In some it has been held that it is not improper to specify the place of residence of the sureties, e. g., *Queen-Empress* v. *Rahim Bakhsh* (2) where Sir John Edge, C. J., said : "It seems to me to be reasonable to expect and require that the sureties to be tendered should not be sureties from such a distance as would make it unlikely that they could exercise any control over the man for whom they were willing to stand surety," adding however "of course Magistrates must not act arbitrarily in these cases ; they must be guided in each case by the facts of the case." In others it has been held that a Magistrate was not justified in refusing the sureties because they lived at a great distance and therefore could not be able to exercise due supervision, e. g., *Abinash Malakar* v. *Empress* (3), where Prinsep and Stanley, JJ., said : "Cases may constantly occur in which a person who is in a position to give security to any amount on behalf of another may live at a considerable distance and yet he may be prepared to pledge his property on some assurance received from that other person. It is not necessary that he should live in the neighbourhood and always keep his eye on the principal."

On consideration my opinion is that there is no real conflict.

There is a general consensus that, as Sir John Edge said in the case just quoted, Magistrates must not act arbitrarily, as for example by requiring sureties to live within one mile of the residence of the person for whom they are to stand surety or that they are to be landholders or that they are not to be relations. The circumstances of each case must be considered, and any restrictions or limitations must be reasonable.

As it has been said in connexion with the amount of security, "the imprisonment is provided as a protection to society against the perpetration of crime by the individual, and not as a punishment for a crime committed, and being made conditional on default of finding security, it is only just and reasonable that the individual should be afforded a fair chance at least of complying with the required condition of security" : see *Barkat* v. *Empress* (4).

In the present case, I do not think that the Magistrate was justified in requiring that the sureties must be residents of Tebingan, and I also consider that he ought not to have refused to accept either of the two sureties on the grounds stated.

So much of the order as restricts the sureties to residents of Tebingan is set aside, and the order rejecting the sureties above-named is also set aside. The Magistrate is direced to accept them and cause a bond to be signed, and the applicant released.

K.N./R.K. *Order accordingly.*

(1) [1897] 1 U. B. R. 228.
(2) [1898] 20 All. 206=(1898) A. W. N. 21.
(3) [1900] 4 C. W. N. 797.
(4) [1900] P. R. 24 Cr.=1901 P. R. 24.

A. I. R. 1914 Upper Burma 34

MCCOLL, A. J. C.

Mi Ngwe Hmon— Defendant — Appellant.

v.

Mi Pwa Su—Plaintiff—Respondent.

Second Appeal No. 136 of 1913, Decided on 11th December 1913.

Tort—Slander—Repetition of slander is actionable—Criminal law of defamation does not apply—Truth is complete defence.

The repetition of slanders heard from others is actionable unless privileged.

In a civil suit for damages for slander the criminal law of defamation has no application. The suit must be decided according to justice, equity and good conscience. [P 35 C 1, 2]

The proof of the truth of the slander is a complete defence in a civil suit for damages. [P 35 C 1, 2]

A. C Mukerjee—for Appellant.

Ba Din for *San Wa*—for Respondent.

Judgment.—The plaintiff respondent, a married woman, sued the defendant-appellant for damages for slander, alleging that the latter had spread a rumour in the village that she had had sexual intercourse with one Pyaw Bwe. Her first witness stated that the defendant-appellant had told her that the plaintiff-respondent and Pyaw Bwe had been seen sleeping twisted together like snakes. The township Judge appears to have believed this witness, but he held that the evidence showed that plaintiff-respondent's relations with Pyaw Bwe were suspicious and that they were the subject of talk in the village and that the defendant-appellant had only repeated what she had heard and was therefore not liable.

On appeal the learned Additional Judge of the lower Additional Court found that defendant-appellant had exaggerated what she had heard and had thus caused strained relations between plaintiff-respondent and her husband and that whether what defendant-appellant said was true or not, she was liable for damages as none of the exceptions contained in S. 499, I. P. C., applied. He gave plaintiff-respondent a decree for Rs. 60.

The defendant-appellant has now appealed to this Court.

Both of the Courts below have erred in law. If slanderous words used by one man are actionable, the repeating of by another is also actionable unless privileged, and the Township Court erred in supposing that the defendant-appellant was not liable simply because she had only repeated what she had heard from others.

The lower appellate Court was wrong in supposing that the criminal law of defamation had any application. The suit had to be decided according to justice, equity and good conscience and in such matters the Common law of England, though not binding, is generally looked to for guidance.

According to the Common law of England slanderous words imputing unchastity to a woman are not actionable without proof of special damages. This rule however has not been imported into the law in India and now even in England under the Slander of Women Act such words are actionable per se. Another rule which has been generally recognized in India is that proof of the truth of the slander is a complete defence in a civil suit for damages for slander or libel, "because the law will not permit a man to recover damages in respect of an injury to character which he either does not or ought not to possess." It is possible that there might be a case in which the application of this rule would not be in accordance with justice, equity and good conscience, but this is not such a case. If the defendant-appellant used the words complained of, they were certainly actionable, but proof of their truth would be a complete defence.

It has been urged that there is not sufficient proof that defendant-appellant did use the words complained of, that the plaintiff-respondent's witness Ma E Nge is deaf and Ma Tha I, who was admittedly present and in a better position to hear did not hear them. But Ma Tha I stated that after the defendant-appellant had made a remark against the plaintiff-respondent she moved ahead—they were all three walking along the road in single file and did not hear what further conversation defendant-appellant and Ma E Nge had. Besides there is evidence that the defendant-appellant made similar slanderous remarks to others.

Next, it is contended that plaintiff-respondent's conduct was such as to disentitle her to any damages, that during her husband's absence Pyaw Bwe constantly visited her, that they were seen sleeping on the same mat and that plaintiff-respondent's mother-in-law actually requested Pyaw Bwe's father to forbid him to visit the house. The evidence was recorded in English by a Burmese Magistrate and I have no doubt that he has translated the word * * as "sleep" and that what the witness Pyaw Bwe really said was that he had been lying on the same mat with the plaintiff-respondent, which

corresponds with what one of the witnesses for the defence stated, viz., that she had seen Pyaw Bwe and the plaintiff-respondent lying facing each other and talking. This no doubt implies intimacy and I do not disagree with the Township Judge's finding that the plaintiff-respondent's conduct was improper. If the defendant-appellant had merely told others of these proved improprieties she would not have been liable. But she stated in effect that plaintiff-respondent and Pyaw Bwe had had sexual intercourse and she stated this not as an inference from their proved intimacy, but as an independent fact and she failed to prove anything more than impropriety.

I am of opinion therefore that she has rightly been held liable and I do not consider the damages awarded, Rs. 60, excessive.

The appeal is accordingly dismissed with costs.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Upper Burma 36

SHAW, J. C.

Nga Tun E—Petitioner.

v.

Mi Chon—Respondent.

Criminal Revn. No. 574 of 1914, Decided on 22nd September 1914.

(a) Evidence Act (1 of 1872), S. 112—Legitimacy—Presumption can be rebutted by strict proof of non-access—If husband had access adultery will not conclude illegitimacy—Impotence is tantamount to non-access—Scope of S. 112.

The presumption created by S. 112, Evidence Act, can only be rebutted by proof of non-access, and to prove non-access the evidence must be such as to exclude all doubt. If the husband has had access, adultery on the wife's part will not justify a finding of illegitimacy.

Proof of impotence would be equivalent to proof of non-access.

Where the point for decision is one of evidence (e. g., paternity) only, the case would be governed by S. 112 and not by the personal law of the parties. [P 37 C 1, 2]

(b) Burma Laws Act (13 of 1898), S. 13—Question of paternity of child does not come under S. 13.

The question of a child's paternity is not one of succession, inheritance, marriage, or caste, or any religious institution or usage, within the meaning of S. 13, Burma Laws Act, 1898. [P 37 C 2]

S. Mukerjee—for Petitioner.

Vasudevan—for Respondent.

Judgment.—Respondent applied for maintenance for a child of which she alleged the applicant to be the father. She was a married woman living with her husband, Nga Pauk Kyaing, to whom she had been 20 years married without getting a child. Then, as she says, she fell in love with the applicant in 1270 B. E., and two months afterwards became pregnant by him of the child in question. She continued to live with her husband, until two months after the birth of the child, when the husband divorced her. She stated in evidence that from the time when she began to have intercourse with the applicant, she did not allow her husband to approach her.

He, Nga Pauk Kyaing, examined as a witness on respondent's behalf, said that he did not approach his wife from the time she became pregnant though she continued to live in his house, and again that from the time respondent and applicant were accused of having intercourse with each other, respondent would not allow him to approach her, and that this was before respondent was pregnant. He also stated that respondent continually told him that the child with which she was pregnant was not his, and that (after the birth of the child) he tried to catch the applicant and watched and caught him sleeping with the respondent in his house when applicant said: "This is my wife and son, what has it got to do with you," that the headman told him not to take the matter further, and that he accepted Rs. 25 from the applicant as damages.

The midwife stated that the applicant promised to pay for her services when the child was born, and told her not to ask for money from the husband as the child was his, applicant's. This witness is a cousin of respondent's.

Applicant admitted that he had intercourse with the respondent when the child was one year old but not before that, and he denied that he was the father of the child, but admitted that he had to pay, as he said, Rs. 100 to the respondent's husband, Pauk Kyaing. This was all the evidence in the case which it is necessary to mention.

The Magistrate found that applicant was the father of the child. He was assisted to this conclusion by the remarkable similarity of features which he observed between the child and the applicant. He did not refer to S. 112, Evidence Act.

It is now contended on behalf of the applicant that the provisions of S. 112, Evidence Act, were opposed to the Magistrate's finding, and also that there was no clear and conclusive evidence as to the applicant having been the father of the child.

If is unnecessary to discuss the evidence as to applicant being the father. S. 112, Evidence Act, in my opinion, must be held to decide the case. It reproduces a rule of the English law, and the principle on which it is based has been stated to be that it is undesirable to inquire into the paternity of a child when the mother is a married woman and her husband has had access to her. If the husband has had access, adultery on the wife's part will not justify a finding of illegitimacy. The presumption created by the section can only be rebutted by proof of non-access, and to prove non-access, the evidence must be such as to exclude all doubt. Unless it is proved that there has been no opportunity of sexual intercourse between the husband and wife at any time when the child could have been begotten, the presumption is not rebutted. The authorities for these statements are given in Messrs. Ameer Ali and Woodroffe's notes to S. 112 and need not be cited here.

It has been contended on behalf of the respondent that the husband was impotent. On the other hand, Field's Commentary on S. 112 has been referred to on behalf of the applicant, where it is suggested that S. 112 does not permit, as the English law does, proof of impotence. But on this point, Messrs. Ameer Ali and Woodroffe in their commentary say: "There can be as little access when the husband is impotent though present, as when he is capable though absent. It is clear that there was no intention to depart from the English rule on the point." This is a reasonable interpretation, and I am of opinion that proof of impotence would be equivalent to proof of non-access. But there is no proof of impotence here. It cannot be inferred from the fact that respondent and Pauk Kyaing had been married 20 years without children that Pauk Kyaing was impotent. Phenomena of this kind are met with every day where there is no impotence.

The point for determination then is simply whether it was proved that the respondent's husband had no opportunity of sexual intercourse with her at any time when the child might have been begotten. The only evidence on the point is that of respondent herself and her husband which I have summarized above. According to English law this evidence would not have been admissible, but the Evidence Act does not exclude it. It is however in my opinion insufficient. Assuming it to be true, it is to be inferred from what both the witnesses say that sexual intercourse between respondent and her husband continued until the time when respondent began to allow intercourse to the applicant and the pregnancy was recognized within two months of that time. It is obvious from this fact that the husband might perfectly well have been the father. But I find it difficult to credit the statements made by the witnesses as to Pauk Kyaing not having approached the respondent during the many months—some 10 or 11 months it must have been—they professed to have lived together without such intercourse. The opportunity was manifestly there, and the presumption is that there was intercourse. In short, non-access was not satisfactorily proved. This settles the point.

On behalf of the respondent, it has been further contended that according to the Manugye, S. 80 (Richardson's Edition, p. 319), the child in question, being a child begotten secretly in adultery, the wife remaining with her husband, is not entitled to inherit and therefore must be held not to be the child of the husband. The contention is that the Buddhist law being applicable to questions of marriage and inheritance, S. 112, Evidence Act, must be held to have no application. On this point, Messrs. Ameer Ali and Woodroffe in their commentary on S. 112 have some remarks: see Edn. 5, p. 703 and note. Apparently, when the point for decision is one of evidence only, the case would be governed by S. 112 and not by the personal law of the parties. But here, in my opinion, there is no doubt; the question is not only one of evidence as to paternity, it is not one of succession, inheritance, marriage or caste or any religious institution or usage, the only cases in which the Buddhist law is applicable: see Burma Laws Act, 1898,

S. 13. The marriage between respondent and Pauk Kyaing being still subsisting at the time when the child was born and it not being shown that the husband had no access to his wife at the time when it might have been begotten, the law does not allow inquiry to be made as to the child's paternity, and the finding of the Magistrate that the applicant was the father cannot be sustained.

The Magistrate's order is set aside and the respondent's application is dismissed.

K.N./R.K. *Application dismissed.*

A. I. R. 1914 Upper Burma 38

SHAW, J. C.

Mi Hlaing—Appellant.

v.

Mi Thi and *others*—Defendants—Respondents.

Civil Appeal No. 61 of 1914, Decided on 19th October 1914.

Buddhist Law—Inheritance—Orasa daughter's claim to get one-fourth after father's death does not apply in case of mother not remarrying.

The texts giving the orasa daughtar the right to claim a one-fourth share after her father's death do not authorize her to claim one-fourth from her mother, at least where her mother has not married again. [P 39 C 2]

Lutter and *Tha Gywe*—for Appellant.

A. C. Mukerjee—for Respondents.

Judgment.—Plaintiff-appellant sued her mother, brother and two sisters for one-fourth of the estate left by her father on his death.

The only point for determination is whether plaintiff-appellant as the eldest child and the eldest daughter is entitled to claim one-fourth of the estate from her mother, there being in existence other children including a brother. It has been alleged before me on behalf of plaintiff-respondent that her brother, defendant-respondent Nga Thein, was a minor at the time of the father's death, four years before suit, but there is no material on the record to show what the age of the defendant-respondent Nga Thein was, and the plaintiff-appellant did not sue him as a minor. As the point seems to me to be immaterial it need not be further referred to.

The learned Judge of the lower Court, on the authority of *Ma Min Tha* v. *Ma Naw* (1) and *Mi Saw Myin* v. *Mi Shwe Thin* (2) and some Lower Burma cases, and after referring to S. 31 of the Kinwun Mingyi's Digest, Vol. I, decided against the plaintiff-appellant.

On behalf of plaintiff-appellant the following cases have been referred to: *Mi Saung* v. *Mi Kun* (3), *Mahng Po Lat* v. *Mi Po Le* (4), *Ma On* v. *Shwe O* (5), *Maung Seik Kaung* v. *Po Nyein* (6), *Mi Thin* v. *Mi Wa Yon* (7). *Tun Myaing* v. *Ba Tun* (8), *Tha Tu* v. *Nga Bya* (9), *Mi Po* v. *Mi Swe Mi* (10), *Mi Min Din* v. *Mil Hle* (11)

(1) was a case in which the only point decided was that no children other than the eldest can claim a share of inheritance from the surviving mother on the death of the father. It was not decided in that case whether an eldest daughter can claim a one-fourth share.

In (2) also the right of an eldest daughter to claim a one-fourth share was not decided.

(3) was the decision of the special Court, Lower Burma, declaring that on the death of one of the parents the eldest son or daughter may claim a share and that the rest of the property vests in the surviving parent for himself or herself and the remaining children, etc. It was dissented from by Mr. Burgess in *Mi Min Tha* v. *Mi Naw* above cited. It did not declare that the eldest daughter is entitled to claim a one-fourth share from her mother.

(4) was a suit by an eldest son for a one-fourth share against his father who had married again. The right of an eldest daughter to claim a one-fourth share from her mother under any circumstances was not in issue and was not decided.

(5) was a suit by an only daughter, the only child, claiming a one-fourth share from her mother, on the mother's remarriage after the father's death. It affirmed the right of the daughter on the authority of S. 44 of the Kinwun Mingyi's Digest. The present case is distinguishable, because not only is the

(1) [1892-96] 2 U. B. R. 581.

(2) [1912] 15 I. C. 919=1 U. B. R. 125.
(3) S. J. L. B. 115.
(4) S. J. L. B. 212.
(5) S. J. L. B. 378.
(6) 1 L. B. R. 23.
(7) 2 L. B. R. 255.
(8) 2 L. B. R. 292.
(9) 4 L. B. R. 181.
(10) [1897-01] 2 U. B. R. 79.
(11) [1905-06) 2 U. B. R. Buddhist Law, Inheritance, 11.

plaintiff-appellant not an only child, but it is not alleged that the mother was remarried or intends to remarry.

(6) had to do with the claim of a grandson, the son of the orasa sons, and discussed the status of the orasa son. It does not help to a decision of the present case. The incidental remarks contained in it, to the effect that "it is settled law that on the death of one parent it is only the eldest child that can claim a one-fourth share," cannot be regarded as an authority in support of the plaintiff-appellant's case.

(7) had to do with a claim by the eldest daughter to one-fourth of property inherited by her deceased mother against her father on his remarriage. That was an entirely different situation from that of the present case.

Mi Min Tha v. *Mi Naw* (1) is decidedly against the plaintiff-appellant. The plaintiff in that case was the eldest daughter, and she was held to have no interest in the property of her deceased father during the lifetime of her mother, who was the heir of her deceased husband, and not any of the children (but the eldest son who had a right to claim one-fourth) till the mother's death.

The question of the eldest daughter's right as against the mother was very fully investigated anew in *Mi Saw Myin* v. *Mi Swhe Thin* (2) with the result already stated. In the course of this investigation the texts contained in S. 31 of the Kinwun Mingyi's Digest, Vol, I, were examined, as well as several Lower Burma rulings.

The sections of the Kinwun Mingyi's Digest, on which the plaintiff-appellant relies are 30, 31 32, 33, and of these S. 31 only is directly applied. It has been stated in argument however that the plaintiff-appellant has been living separately and that assertion has not been contradicted. If it is correct, the section precisely applicable would seem to be S. 36 and the texts contained in it are all against the plaintiff-appellant. But if the plaintiff-appellant has not been living separately and S. 31 applies, I am of opinion that, as was held in *Mi Saw Myin's* case (2) the texts contained in that section, when carefully examined, furnish no support for the claim put forward by the plaintiff-appellant.

None of them give the eldest daughter the right to claim one-fourth.

The contention of the learned advocates for the plaintiff-appellant is that the only advantage the eldest son has over the eldest daughter is that he can claim one-fourth whether he is the eldest child or not, whereas the eldest daughter can only claim one-fourth where she is also the eldest child. But I am unable to find in the texts of the Dhammathats any substantial support for this contention.

The rules relating to the eldest son's or eldest daughter's right to one-fourth must clearly be understood in both cases to refer to the orasa son, i. e., the eldest capable son, and the orasa daughter, i. e., the eldest capable daughter: see *Mi Min Din* v. *Mi Hle* (11). But this is not the point. The point is that the texts giving the orasa daughter the right to claim one-fourth do not authorize her to claim one-fourth from her mother at least where her mother has not married again.

This being so, it is unnecessary to consider whether the existence of other children and especially of a brother makes any difference,

The plaintiff-appellant did not base her claim on the rules contained in S. 31 of the Digest giving the eldest (orasa) daughter the right to a share of slaves, buffaloes, etc.

These rules also were not to be applied except in certain circumstances, and are scarcely applicable at all to modern conditions of life.

My conclusion is that the lower Court was right and that plaintiff-appellant's claim against her mother for a one-fourth share is unsustainable.

The appeal is dismissed with costs.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Upper Burma 39

MCCOLL, A. J. C.

U. Tilawka—Plaintiff—Appellant.

v.

Nga Shwe Kan and *others* — Defendants—Respondents.

Second Appeal No. 41 of 1914, Decided on 21st December 1914.

Buddhist Law (Burmese) — Monk cannot enter into valid contract for his own benefit.

A Buddhist monk is incapable of entering into a valid contract for his own personal benefit. Therefore he is prohibited by his personal law

from buying, selling or mortgaging land and was debarred from suing for redemption.

[P 42 C 2]

A. C. Mukerjee—for Appellant.

San Wa—for Respondents.

Judgment. — The plaintiff-appellant, who as I have already held, must be taken to be a rahan, sued to redeem some land which he alleged he, another rahan and a woman had jointly mortgaged in 1245. He further alleged that he had inherited a share of the land from his father. The woman (Ma Po) was dead and plaintiff-appellant was the sole plaintiff.

An objection was taken in the written statement that the plaintiff had been a monk for 40 years and that he could therefore have no claim to the land. The point was noticed in his judgment by the Township Judge, but it was not adequtely dealt with. The Township Judge gave plaintiff a decree for redemption.

On appeal the lower appellate Court held that the alleged mortgage had not been proved and dismissed the suit.

In this appeal the first question to be decided is whether the suit is not bad ab initio.

In *Ma Pwe* v. *Maung Myat Tha* (1) it was held that a Burman, on becoming a Buddhist monk, ceased to have any interest in the property of which he had up to then been the owner. The first Court held that this ruling did not apply, as the plaintiff-appellant was already a monk when he mortgaged the land.

The land in suit is alleged to have descended from the plaintiff-appellant's father, but there is no evidence as to when the latter died. The land is alleged to have been mortgaged by him, redeemed by the plaintiff-appellant and two others and re-mortgaged by them to the defendant-respondent's parents. There is also nothing to show when the plaintiff-appellant became a monk, except the allegation in the written statement that at the time the suit was brought he had been a monk for 40 years, a statement which has not been contradicted. If he became a monk after his father's death then the ruling cited aboved would apply, and it would be clear that the plaintiff-appellant had no right to redeem the land and that he had no interest which he could mortgage. If however at the time of his father's death he was already a monk the question would arise as to whether a monk can inherit from a layman. This question was raised in *Ma Taik* v. *U Wisenda* (2) and was decided in the affirmative, but it is questionable whether that decision was not obiter, because in that case the plaintiff left the priesthood during the trial of the suit and it seems to have been held that that fact removed the legal difficulty.

Of course assuming that the plaintiff-appellant has no title, that fact would not necessarily disentitle him to a decree. If the mortgage were proved and it was shown that the defendants-respondents' predecessors were let into possession by him, the defendants-respondents would be estopped from denying his title. But the question is a broader one than a mere question of title or estoppel. The question is whether a Buddhist monk is capable of entering into a vaild contract such as a mortgage not on behalf of the Sangha, but for his personal profit. A further difficulty arises that the mortgage is said to have been effected in 1245 B. E. and consequently the Contract Act is not applicable, and though the Dhammathats show that, as the late Mr. Burgess said: "In mordern times the Burman Buddhist monk's vows of poverty sit lightly on him" and provide rules for the distribution of property acquired by a monk by trade or usury, I have been unable to find anything to show that such contracts would have been given effect to by the Burmese Courts prior to the annexation or that they were recognized as valid by Burmese jurists. The existence of such property could not be ignored and consequently rules were framed for its disposal, and it was provided that it was to be inherited by the monk's lay relatives and not by members of the order "because it is not property given him by others as a religious gift" (Yazathat, S. 409, U Gaung's Digest, Vol. 1, a passage which clearly indicates that a monk was debarred by the rules of his order from possessing property other than that given as religious gift, either to him, another monk, a Gana or the Sangha and that the jurists recognized this rule as of force in their legal system). The text from the Kyannet given in S. 152 of U Gaung's Digest,

(1) [1879-1901] 2 U. B. R. 54.

(2) 2 Chan. Toon's L. C. 235.

Vol. 2, shows that in the compiler's opinion the ordinary law was subject to the rules of the order, and that though a layman might have a certain legal right, that right could not be enforced by a monk if it was opposed to the rules of the order.

There can be no question at all but that the idea of a Buddhist monk buying and selling or mortgaging land for his own benefit is totally opposed to the rules by which Buddhist monks profess to be governed.

In the beginning they were ascetics who gave up the pleasures of the world in order to gain the peace of a soul that had no desires of any kind, and there can be no doubt but that even at the present day they profess to live on charity. That many of them, owing to the piety of laymen as a matter of fact live in greater comfort than they would have done had they not embraced the religious life, in no way affects the question. They are not supposed to ask for anything and I belive this rule is nearly always kept, but on the other hand they cannot ordinarily refuse to accept a gift because to do so would be to deprive the intending donor of merit in the next world.

When a dispute between two monks is referred at the present day to Gaing Gyoks or the Thathanabaing, it is decided as far as possible according to the rules contained in the Vinaya and it seems to me clear that the personal law of Buddhist monks is to be found there and nowhere else, and that it cannot be said to have been modified to any extent by custom, as custom does not form part of the rules of decision adopted by the ecclesiastical authorities.

The fact that many monks have so far strayed from the rules originally laid down by the Buddha as to trade and buy and sell land therefore is no reason for holding that they are subject to the same law of contract as laymen, and I think it is clear that a monk is debarred by the rules of his order from mortgaging property descended from his ancestors, and indeed from owning such property. No doubt the Dhammathats recognize that the flesh is weak and that monks do not alway conform to the rules laid down for their guidance, and they therefore lay down rules for the succession by lay relatives in such cases, but those rules do not affect the personal law of the monks at all. That their personal law forbids trading and mortgaging land and so on, I think there can be absolutely no doubt. The late Mr. Burgess in *Ma Pwe* v. *Maung Myat Tha* (1) showed clearly enough that on becoming a monk a Buddhist severs himself from the world and forsakes riches to practise poverty, but I would supplement his remarks by citing the following texts:

"Whatsoever Bhikku shall receive gold or silver or get some one to receive it for him or allow it to be kept in deposit for him—that is a pakittiya offence involving forfeiture."

"Whatsoever Bhikku shall engage in any one of the various transactions in which silver is sued—that is a pakittiya offence involving forfeiture."

"Whatsoever Bhikku shall engage in any one of the various kinds of buying and selling—that is a pakittiya offence involving forfeiture": *Patimokkha Nissagiya Pakittiya Dhamma*, Ss. 18, 19 and 20.

Thus a trading transaction was not only an offence requiring expiation; it was void, and the Bhikku was deprived of any profit he might have made. The translators of the Vinaya, Messrs. Rhys Davids and Oldenberg, describe the method of procedure on a breach of these rules. The guilty Bhikku had to give up the gold or silver to the Sangha, and a lay servant of the Bhikkus would either buy ghee or oil with it for the Sangha or would throw it away.

When dying the Buddha said that after his death the Sangha might, if it so wished, revoke all the lesser and minor precepts, and a certain number of Bhikkus wished that certain of the more irksome precepts might be done away with or altered but a difficulty arose as to what were lesser or minor precepts; and so it was decided at the Council of Ragagaha that none of the precepts should be abolished or altered:

"Then the venerable Maha Kassapa laid a resolution before the Sangha. Let the venerable Sangha hear me. There are certain of our precepts which relate to matters in which the laity are concerned. Now the laity know of us that such and such things are proper for you Samanas who are Sakyaputtiyas and such and such things are not. If we were to

revoke the lesser and minor precepts it will be said to us "a set of precepts was laid down for his disciples by the Samana Gautama to endure until the smoke should rise from his funeral pyre. So long as their teacher remained with these men, so long did they train themselves in the precepts. Since their teacher has passed away from them, no longer do they now train themselves in the precepts."

"If the time seems meet to the Sangha not ordaining what has not been ordained and not revoking what has been ordained, let it take upon itself and ever direct itself in the precepts according as they have been laid down. This is the resolution—whosoever of the venerable ones approves thereof let him keep silence. Whosoever approves not thereof let him speak. The Sangha has taken upon itself the precepts according as they were laid down, Therefore does it keep silence. Thus do I understand:" Kullavagga, Bk. 11, i. 9.

Then again at the Council of Vesali to which was submitted the question whether on ten points the rules laid down for the monkhood should be relaxed, it was decided that they should not. One of these was the rule against accepting gold and silver and another was as to whether a precedent could be taken as an excuse for not conforming to the rules. It was decided before 700 Bhikkus that the rule as to gold and silver should not be relaxed and that a precedent was no excuse for doing what was forbidden: Kullavagga, 12, 2, 8.

I am, of course, well aware that many monks in modern times disregard part of the 18th Nissaggiya Pakittiya, and though they do not actually handle gold and silver themselves, accept money through a "Koppiya" who keeps it for them, but as a precedent is to be no excuse and as such conduct does not appear to have been sanctioned by the Sangha, as a whole, it must be held that monks who act thus break the rules of their order and are liable to have the money confiscated to the Sangha.

As showing to what length some monks are willing to go in disregard of their vows, I would mention that at the hearing of this appeal it was stated that some years ago, a Buddhist monk brought a suit in the District Court of Mandalay for restitution of conjugal rights, though sexual intercourse is the first of the four cardinal sins which a monk can commit. It is to be presumed that that monk was refused relief, and it must, I think, be held in the present case that the plaintiff-appellant is entitled to no relief. If the Contract Act had been in force at the time, the alleged mortgage would have been void so far as plaintiff-appellant is concerned under S. 23 as defeating the plaintiff's personal law, and although the Contract Act cannot be applied, as the question for decision is one regarding religious usages the Buddhist law must form the rule of decision, and I think it must be held that so as far the plaintiff-appellant is concerned the alleged mortgage was void, just as it would certainly be held that a Buddhist monk could not contract a valid marriage or sue for restitution of conjugal rights so long as he remained in the priesthood.

Further, asauming that the mortgage was valid because Ma Po was one of the mortgagors and that the plaintiff-appellant was entitled to inherit from his father because he became a monk before the latter's death—a point which I am not prepared to admit—he must still be debarred from suing for redemption as one having an interest in the mortgaged property, because a monetary transaction, such as a redemption, is forbidden by his personal law.

No doubt this decision may have very wide consequences, but a Buddhist monk, who has taken vows of poverty and who professes to have abandoned the pleasures of the world, bringing a suit for his own personal profit is not an edifying spectacle, and I do not think such monks have any cause for complaint if their vows are regarded by the Courts in a more serious light than they regard them themselves. I cannot conclude this judgment better than by quoting the late Mr. Burgess.

"But there can be no doubt that such relaxation of ancient austerity has to be confined within reasonable limits, and that it does not extend to the renunciation of the world involved in the formal adoption of the religious life. The service of God and Mammon cannot be combined. To retain the sensual enjoyments of the secular and at the same time to pretend to the sanctity of the sacred life would be to turn the whole

thing into a sham and farce, and would be unquestionably offensive to popular sentiment."

I accordingly hold that the plaintiff-appellant cannot succeed in his suit and dismiss the appeal with all costs.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Upper Burma 43 (1)

SHAW, J. C.

Nga Ti —Plaintiff — Appellant.

v.

Nga Pan and *another* — Defendants—Respondents.

Second Appeal No. 55 of 1912, Decided on 3rd December 1913.

Civil P. C. (5 of 1908), S. 11 — Appeal leaving finding on an issue undecided cannot operate as res judicata.

Where an appeal is preferred against the finding of an issue, but the appellate Court does not decide finally on that point as the appeal is disposed of on other points, it cannot be held that the finding of the lower appellate Court is final and therefore the decision cannot operate as res judicata. [P 43 C 1,2]

S. Vasudevan for *J. C. Chatterjee*—for Appellant.

S. Mukerji—for Respondents.

Judgment.—The only point for determination is whether the question of the reunion of Nga Tet and Mi Pan after divorce was res judicata in the present suit. It was raised and decided in a previous suit between the same parties by the Court of first instance and the lower appellate Court, but the judgment of the lower appellate Court was appealed against and the judgment of this Court in second appeal (Second Civil Appeal No. 228 of 1911) did not decide this point, but upheld the decision of the lower appellate Court dismissing the plaintiff-appellant's suit on another ground, namely, that he had not proved the mortgage which he alleged.

The plaintiff-appellant had made it one ground of his appeal in his memorandum of second appeal that the decision of the lower appellate Court in regard to the reunion was wrong, but the learned Additional Judge came to no decision on this point—the decision in regard to the proof of the mortgage being sufficient for the disposal of the case.

As an appeal was preferred and an objection taken against the finding of the lower appellate Court on the point in question, I think it must be held that the matter of reunion was not heard and finally decided in the previous suit within the meaning of S. 11, Civil P. C. This is in accordance with the decision of a Bench of the Calcutta High Court in *Rai Charan Ghose* v. *Kumud Mohun Dutt Chowdhry* (1), where Banerji, J., read the words "heard and finally decided by such Court" to mean "heard and finally decided by such Court either if no appeal is preferred from its judgment or if an appeal being preferred has been disposed of, and the judgment of the appellate Court which takes the place of its judgment has decided the point."

The decree of the lower appellate Court is therefore set aside and it is directed to proceed to dispose of the appeal on the merits. Costs will abide the final result.

K.N./R.K. *Case remanded.*

(1) [1898] 25 Cal. 571=2 C.W.N. 297.

A. I. R. 1914 Upper Burma 43 (2)

SHAW, J. C.

Emperor—Prosecutor.

v.

Nga Nyan U—Accused.

Criminal Revn. Petn. No. 691 of 1914, Decided on 15th October 1914.

Penal Code (45 of 1860), Ss. 215 and 379—Conviction under S. 215 of one convicted for theft is not correct.

Section 215, I. P. C., is not intended to apply to the thief himself, and therefore where a man is convicted of theft, he ought not to be also convicted under S. 215 of taking a gratification to restore the stolen property. [P 44 C 1]

H. M. Lutter—for the Crown.

Judgment.—The Subdivisional Magistrate convicted the accused, Nyan U, under S. 379, I. P. C., of the theft of a bull and sentenced him to two years' rigorous imprisonment for that offence, and at the same time convicted him under S. 215 and sentenced him to two years further rigorous imprisonment under that section for having agreed to accept a gratification of Rs. 30 for the return of the bull to the owners.

On appeal the Sessions Court upheld the double conviction, but reduced the sentence under S. 215 to one year. The Sessions Judge overlooked the Lower Burma Ruling in *Twet Pe* v. *Emperor* (1) while referring to the previous Lower Burma decisions on the subject.

(1) [1907-08] 4 L.B.R. 199=14 Bur. L. R 67=7 Cr. L. J. 464.

The Government Prosecutor has now been heard. In addition to the decisions mentioned in the Lower Burma case, he has drawn my attention to the case of the accused *Kudumbam* (2), where a Bench of the Madras High Court came to the same conclusion as that afterwards arrived at in *Queen-Empress* v. *Muhammad Ali* (3) and in *Twet Pe* v. *Emperor* (1) already cited, namely, that S. 215, I. P. C., is not intended to apply to the thief himself, and that where a man is convicted of the theft, he ought not to be also convicted under S. 215 of taking a gratification to restore the stolen property.

It is a remarkable fact that there should have been so few decisions on the subject, since it must have been a very common practice both in England and in this country for thieves to take money for restoring stolen property. But according to the learned Chief Judge of the Chief Court "the English decisions . . . . . are all in cases in which a person other than the actual thief was prosecuted for taking a gratification." This is the more remarkable because in *Reg* v. *Edward* (4), the judgment of the Chief Justice in which is quoted Russell on Crimes, Edn. 5, Vol. 2, p. 492, it would appear that the English law does not really exempt from liability the actual thief.

On the face of S. 215, I. P. C., I should have been disposed to say that the object of the legislature in the clause "unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence" was to exempt from liability to punishment a person who is acting honestly and not to exempt the thief. But I do not feel justified in going against the weight of authority embodied in the decisions above cited.

I must therefore hold that the double conviction of Nyan U was wrong. I set aside the conviction and sentence under S. 215, I. P. C.

K.N./R.K. *Conviction set aside.*

(2) 1 Weir 196.
(3) [1901] 23 All. 81.
(4) [1843-46] 1 Cox. C. C. 32.

A I. R 1914 Upper Burma 44

MCCOLL, A. J. C.

Nga Po and *another*—Plaintiffs—Appellants.

v.

Nga So Pe—Defendant—Respondent.

Second Appeal No. 24 of 1913, Decided on 26th February 1914.

Limitation Act (9 of 1908), Art. 142—Art. 142 applies to suit for ejectment of trespasser from land allowed to lie fallow—Plaintiff must prove ownership and possession within 12 years—Meaning of discontinuance of possession explained.

In a suit for ejectment of a trespasser from certain land allowed to remain fallow for many years by the owner, the defendant pleaded that the land had been waste land for 40 years and he cleared the jungle with the permission of the Thugyi and was in occupation.

Held: that the suit was governed by Art. 142, Sch. 1, Lim. Act, and the plaintiffs must prove that they were the rightful owners and were in possession at some time within 12 years before the suit. [P 45 C 1]

Discontinuance of possession means an abandonment of possession by one person followed by the actual possession of another person. [P 45 C 1]

C. G. S. Pillay—for Appellants.

Judgment.—The plaintiffs-appellants sued for possession of some land, alleging that they had allowed it to remain fallow for many years, that in 1271 the defendant-respondent entered upon it without their permission and worked it, that they protested, whereupon he promised to pay rent, that that year he only offered one basket of paddy as rent though they demanded five, that the next year he refused to pay any rent at all, that the lease was then determined and that in 1273 the defendant-respondent again entered upon the land without their permission and refused to give it up.

The defendant-respondent pleaded that the land had been waste land for 40 years, when he entered upon it and cleared the jungle with the permission of the Thugyi. He denied having attorned to the plaintiff-appellant.

The Courts below having held that the suit was time barred under Art. 142, Sch. 1, Lim. Act, the plaintiffs-appellants have come up to this Court in second appeal.

The first Court relied on *Mg. Nyun* v. *Ma Nyein Zan* (1), but as the facts of that case are not very fully set out it is difficult to say how far it is a parallel case and I think Mr. Burgess' dictum, "if the land was left unworked for 41

(1) [1892-96] 2 U. B. R. 375.

years the plaintiffs or their predecessors presumably relinquished possession," is open to question. A landowner is under no obligation to cultivate his land, though of course if he allows it to remain uncultivated more than a certain number of years he is liable to be assessed to revenue at full rates instead of at fallow rates. The suit no doubt was governed by Art. 142, but the appellants alleged dispossession in 1271 and again in 1273. What they had to prove therefore to show that the suit was within time was that they were in possession in 1271. Now the rule is that when no one exercises active dominion over land the possession remains with the rightful owner: *Rajah Leelanund Singh* v. *Mt. Basheeroonissa* (2), so that if the plaintiffs-appellants showed that they were the rightful owners and they had once been in possession, it would be presumed that that possession continued right down to 1271 if it appeared that their possession had not been interrupted till then. It was of course open to the defendant-respondent to prove that the plaintiffs-appellants' possession had been interrupted and then the presumption that they were in possession in 1271 would have been rebutted, but no such evidence was given.

The evidence given by the defendant-respondent's witnesses was to the effect that the land had been lying waste since the annexation. In view of the defence set up and the absence of rebutting evidence, I consider that the evidence of plaintiff-appellant 2 and that of the witness Mg. Kaw, together with an entry in a revenue map, is sufficient evidence that the plaintiffs-appellants are the rightful owners and the evidence of the witness Mg. Shwe, to the effect that he worked the land as plaintiffs appellant's tenant for two years about the time of the annexation of Upper Burma, is sufficient evidence that the plaintiffs-appellants were in possession then, and they must be held to have continued in possession until they were dispossessed by the defendant-respondent. There was no discontinuance of possession. "Discontinuance "means" an abandonment of possession by one person followed by the actual possession of another person:" Starling's, Indian Limitation Act, Edn. 5, p. 402.

(2) [1871] 16 W. R. 102.

The decrees of the Courts below are set aside and the plaintiffs appellants will be given a decree for possession with all costs.

K.N./R.K. *Appeal allowed.*

A. I. R. 1914 Upper Burma 45

MCCOLL, J. C.

Mi The O—Plaintiff—Appellant.

v.

Mi Swe and *others*—Defendants—Respondents.

Second Appeal No. 261 of 1914, Decided on 17th November 1914.

Buddhist Law (Burmese) — Inheritance — Eldest daughter—Nature of eldest daughter's interest in mother's lifetime—Rules of eldest daughter's inheritance stated.

Under the Buddhist law the eldest daughter during the lifetime of her mother has not such an interest in the estate of her deceased father as is contemplated in S. 91, T.P. Act.

The rule appears to be as follows :

1. The eldest daughter can only claim one-fourth of the bulk of the estate if her mother dies first and she is capable of replacing her mother in the household.

2. Sometimes the eldest daughter on marrying and leaving the parental roof is given her share of the estate during the lifetime of both parents. In that case she has no further claim on the estate.

3. If this has not happened the eldest daughter on the death of her father is entitled to certain specified property and her mother gets the bulk of the estate.

4. If on the death of the father the mother marries again the eldest daughter is further entitled to one-fourth of her father's wearing apparel and ornaments, but her mother still retains the bulk of the estate. [P 49 C 1]

Tha Gywe—for Appellant.

A. C. Mukerjee—for Respondents.

Judgment. — The plaintiff-appellant sued for the redemption of some land which she alleged had been mortgaged by her grandmother Ma Swe Mi. She is the only child of Ma Swe Mi's deceased son Maung Lu Pe. The lower appellate Court dismissed the suit on the ground that as her mother, Ma Yo, was still alive, the plaintiff-appellant had no such interest in the land as would entitle her under S. 91, T. P. Act, to redeem it.

The plaintiff-appellant has appealed to this Court, and it is urged in the first place that as Maung Lu Pe's eldest daughter she has a vested interest in his estate, and, secondly, that as her mother Ma Yo has married again plaintiff-appellant has a right to an immediate partition with her mother and

has therefore a right to redeem. It has been pointed out that it was held by the Judicial Commissioner of Lower Burma in *Me On* v. *Ko Shwe O* (1) and in *Ma Me* v. *Ma Myit* (2), that on the death of one parent the eldest child, whether son or daughter, could claim one-quarter of the estate from the surviving parent and that in *Ma Gyi* v. *Maung Po Hmyin* (3), it was practically held that not only the eldest child but the younger children obtain an interest in their parents' estate on the death of one parent, an interest which will be recognized by the Courts.

The arguments on which these rulings are based are however vitiated by the fact that mistranslations of the texts from the Dhammathats were relied on, as I pointed out in *Mi Saw Myin* v. *Mi Shwe Thin* (4).

The rule as to when the eldest son or the eldest daughter can claim one-quarter of the bulk of the estate has been clearly pointed out by Chan Toon and is as follows : On the death of the father, the eldest son, if competent to take his father's place, can claim one-quarter of the bulk of the estate, because he is so competent. But (as he cannot replace her) if his mother dies before her husband, he cannot claim one-quarter of the bulk of the estate but only certain specified property. Similarly it is only when the mother dies first that the eldest daughter can claim one-quarter of the bulk of the estate : against her mother she can only claim certain specified property, as I pointed out in *Mi Saw Myin's* case (4).

There is ample authority that the rule is as stated. I pointed out some of the authorities in that case and I shall incidentally refer to others when dealing with the next point. I have so far been referring to cases where the surviving parent does not marry again. When there is a remarriage the case is not so simple. In the present case Ma Yo is said to have married again, and the question is whether her only daughter can on that account claim a share of property which her father inherited during the marriage. Of course, if Maung Lu Pe had pre-deceased his mother, Mo Yo would have no claim to the latter's property and the plaintiff-appellant would be the sole heir, but it is clear that Maung Lu Pe died some years after his mother and so his share of her estate became the lettetpwa of himself and his wife.

The learned counsel for the plaintiff-appellant relies on *Ma Thin* v. *Ma Wa Yon* (5), in which a Full Bench of the Lower Burma Chief Court held that a daughter being an only child was entitled to claim a one-fourth share of her parent's joint estate from her mother, when the latter remarried after the father's death. The judgment was delivered by Birks, J., and he clearly indicated that the question was by no means an easy one. He said that the matter was dealt with in S. 44 of U Gaung's Digest in which texts from 12 Dhammathats were collected and that of these seven Dhammathats allowed the daughter to claim a share whilst the Manukye, Manu and Amwebon were against this rule. I think it likely that there is a misprint in the judgment. There does not appear to be such a Dhammathat as the Minja and though there is a Dhammathat called the Kaingza no text from it appears in S. 44 and I think it not unlikely that "Kaingza, Minja" is a misprint for "Kungyalinga". Thus six only of the texts collected in S. 44 are apparently in favour of a partition on the mother's marrying again. Birks, J., apparently overlooked the dhamma when he said that the Manukye, Manu and Amwebon seemed to say that the eldest daughter was merely entitled to a quarter-share of the father's clothes and ornaments. So of the 12 texts collected in that section six are in favour of a partition and four against one : the other two do not refer to daughters at all. Furthermore these six texts do not agree amongst themselves as to whether all the children can claim a partition or only the eldest daughter. Birks, J., also referred to the Vilosa, Rasi and Kyetyo Dhammathats and said that as according to texts from them collected in S. 31 the eldest daughter was entitled to one-fourth of the estate on the death of her father, whether her mother married again or not ; no texts from these Dhammathats appeared in S. 44. I shall refer to these Dhammathats later.

(1) S. J. L. B. 378.
(2) P. J. L. B. 48.
(3) [1910] 8 I. C. 439.
(4) [1912] 15 I. C. 919=1 U. B. R. 125.
(5) [1903-190 2 L. B. R. 255.

Birks, J., did not explain what induced him to accept the rule laid down by the six Dhammathats referred to above rather than that laid down by the other four Dhammathats; he did not say that he would decide according to the numerical majority and he did not go into the question of the weight to be attached to the individual Dhammathats ; and the Manukye, which by common consent has greater weight than any other Dhammathats is one of the minority.

After referring to S. 44 of the Digest Birks, J., quoted at length S. 159 of the Attasankhepa Dhammathat which is certainly in favour of a partition on either parent marrying again, and apparently it was this text that proved the deciding factor, though Birks, J., did not say so. Beyond saying that as a matter of fact partition of property was usually effected on a second marriage, he gave no reason at all for selecting one rule rather than the other. He merely said: " There is certainly ample authority in the Dhammathats for holding that a single daughter is entitled to claim one-fourth share of the joint estate from her mother on the death of the father when the mother remarries." This is quite correct, but unfortunately there is also ample authority in the Dhammathats for holding the contrary and the question is what principles are to be followed in choosing between contradictory texts.

The Attasankhepa Dhammathat was compiled by the late Kinwun Mingyi, U Gaung, and is entitled to much weight. No doubt the law as administered when it was compiled was not exactly the same as it was when the earliest Dhammathats were written 1,000 years previously. Nevertheless, I believe it is correct to say that the various Dhammathats do not really lay down the case law as it stood at the time they were written, but the opinions of the compilers as to what the law had originally been. Every now and then we come across indications that this is so. There is one in S. 44 itself. In the Yazathat the compiler, after laying down the rule that the eldest daughter can claim one-fourth of the estate and that the younger children can only get their shares on the death of the surviving parent, goes on to say : "Although the above is the statement of the law in the Dhammathats, yet as the surviving parent has not remained single controlling the children as he or she ought to do, the younger children should be given half the deceased parent's share". Thus the compiler first states the law as he believes it to be according to ancient authorities and then says how in his opinion the law ought to be altered. Unfortunately there is nothing to show whether his opinion was adopted ; the instances of case law are few and probably for the most part legendary. Consequently the date of a Dhammathat furnishes practically no clue to its authority and the Attasankhepa cannot therefore claim special authority merely because it is the most modern of all the Dhammathats. In the introduction to the translation it is stated that the work contains the views of U Gaung on the law as it actually stood at the time of its compilation, but as it is also stated that it was prepared on consideration and comparison of all the available texts, it would appear that the compiler's views were based not on practice but on theory, not on case law but on ancient texts. The unknown author of this introduction goes on to say : "It (the Attasankhepa) is not to be regarded as the ultimate authority on questions of Buddhist Law, but the Courts will find it useful as a work of reference and it may fitly be consulted as explanatory of the older Dhammathats."

Now if S. 159 of the Attasankhepa be read in the light of these remarks, it will be seen that it is an attempt to reconcile numerous very conflicting texts. It must be considered as a commentary and not as an authority in itself and in my opinion, the attempted reconciliation of the conflicting texts is not successful.

How conflicting those texts are was, I think, hardly realized by the learned Judges who decided *Ma Thin* v. *Ma Wa Yon* (5).

For instance the text from the Panam cited in S. 44 runs as follows : "Children can claim partition of inheritance, when after the death of the father the mother marries again." But the text from the same Dhammathat given in S. 38 runs : "The daughter living with the mother shall inherit the estate on the death of the mother. She has no right to protest should the estate be exhausted by the mother during her lifetime in the main-

tenance of herself and her subsequent husband. Of course, the most natural attempt to reconcile these two texts would be to assume that the first of them refers to children living apart from their parents, and a distinction is drawn in the Attasankhepa between children who continue to live with their mother after her marriage and those who live separately, but the rules laid down there apparently have no place in any of the other Dhammathats, they are an agglomeration of contradictory texts with the addition of other rules invented apparently for the purpose of harmonizing them. Anyone attempting to reconcile these two contradictory texts from the Panam as suggested above would find on reading S. 36 of the Digest that his attempt was a failure, because the text from the Panam in that section runs as follows : " On the death of the father, the daughter living separately from the parents shall get such property as ornaments and cups used in the performance of a ceremony and given her by both parents at the time of performing it. She should be given a dowry commensurate with the means of the parents, when she is given in marriage and she leaves the parental roof with her husband." Clearly she is not to get one-fourth of the estate.

To take some other Dhammathat relied on by Birks, J. The following four texts are from Vilasa :

Section 34: " Children other than the eldest child are entitled to partition of inheritance only when both parents are dead."

Section 36: " On the death of the father the rule of partition between the mother and daughters living separately is as follows : The daughter shall get the property such as gold . . . . . given her . . . . . when she was young . . . . . On the death of the father the mother alone is entitled to all the property. The daughter living separately can get only what is given her by the mother through affection."

Section 38: " On the death of the father the mother gets the whole estate. The daughters living with the mother shall not get anything while the mother is still living. The mother has the right of use of the estate for life for the maintenance of herself and her subsequent husband."

Section 46: " After the death of the husband the wife shall not say to her children that partition shall be made only on her death. The children shall have their inheritance, although she may not marry again."

It will be seen that these texts all from the same Dhammathat are hopelessly conflicting : there is no possibility of reconciling them. The Rasi on which Birks, J.. also relied is not a whit more consistent. On the other hand the Dhammathats which Birks, J., rejected, viz., the Manukye, the Dhamma, the Manu and Amwebon are not self-contradictory and agree with each other. To the texts from these Dhammathats quoted in S. 44 may be added the following text from the Dhammathatkyaw given in S. 36 : on the death of the father the rule of partition between mother and eldest daughter who lives apart from the parents, is as follows :

" The daughter shall get such property as necklaces, anklets, bracelets, earrings, hairpins, gold, silver and slaves and bullocks, buffaloes, lands, etc., given her by both parents, when she was young, at the ceremony of placing her in the cradle, of first tying the hair into a knot, and at the time of her marriage. Such property has become her separate property. She shall also get the property given her when she sets up a separate establishment. On the death of the father the mother obtains all the property. Should it be exhausted by her on her maintenance or on that of herself and her subsequent husband or in the performance of works of merit let it be so, the children living with her are entitled to the residue if there is any."

It must be recognized that it is impossible to reconcile the different Dhammathats and I think that those of them should be rejected which are inconsistent with themselves. This is obviously necessary, because if it were decided to rely on one of them it would be impossible to decide which of the contradictory texts to accept as binding. The other Dhammathats are not self-contradictory and they agree very well with one another and it is a matter of satisfaction that one of them should be the Manukye which has generally been considered to have special authority.

The rule then appears to be as follows :

1. The eldest daughter can only claim one-fourth of the bulk of the estate, if her mother dies first and she is capable of replacing her mother in the household.

2. Sometimes the eldest daughter on marrying and leaving the parental roof is given her share of the estate during the lifetime of both parents. In that case she has no further claim on the estate.

3. If this has not happened, the eldest daughter on the death of the father is entitled to certain specified property and her mother gets the bulk of the estate, as explained in *Ma Sawe Myin* v. *Mi Sham Thin* (4).

4. If on the death of her father the mother marries again, the eldest daughter is further entitled to one-fourth of her father's wearing apparel and ornaments, but her mother still retains the bulk of the estate.

In the Manukye Dhammathat there is a further provision that if the mother marries again, the eldest daughter's share of the whole estate shall be publicly made known and shall be kept in the custody of the mother. This clearly indicates that the eldest daughter cannot claim this share during her mother's lifetime and there are so many texts permitting the mother to exhaust the whole of the property in maintaining herself and her second husband, that it seems clear that the eldest daughter does not obtain a vested interest, as defined in S. 19, T. P. Act, in this share until her mother's death. It looks as if this provision was meant to safeguard the eldest daughter's share as against her own brothers and sisters and the possible offspring of the second marriage.

I am therefore of the opinion that the plaintiff-appellant has not such an interest in the property sought to be redeemed during the lifetime of her mother as is contemplated in S. 91, T. P. Act, and that therefore the decision of the lower appellate Court is correct.

The appeal is accordingly dismissed with costs.

K.N./R.K. *Appeal dismissed.*

1914 U. B./7

A. I. R. 1914 Upper Burma 49

MCCOLL, A. J. C.

Nga Po Kan—Plaintiff—Applicant.

v.

Nga Shwe Dat—Defendant—Respondent.

Civil Revn. Petn. No. 91 of 1912, Decided on 19th January 1914.

(a) Limitation Act (9 of 1908), S. 5—Delay due to presentation in wrong Court through ignorance held not sufficient cause.

Discretion when applied to a Court of law means discretion guided by law. It must not be arbitrary, vague and fanciful but legal and regular. The presentation of an appeal to a wrong Court through a mistake in ignorance of law is not a sufficient cause for admitting an appeal after time. [P 50 C 2, P 51 C 1]

(b) Civil P. C. (5 of 1908). O. 7, R. 6, and O. 41, R. 1—Grounds for exemption must be stated in memorandum.

In an appeal filed after time the appellant should state in his memorandum of appeal the grounds on which he asks the Court to admit it after time. [P 50 C 1]

J. N. Basu—for Applicant.

E Ba Din—for Respondent.

Judgment. — The plaintiff-applicant sued the defendant-respondent, alleging that he had stood surety for his deceased brother on a sale of goods, and obtained a decree in the Township Court. The decree is dated 1st November 1911. On 6th November the defendant-respondent applied for a copy of the Township Court's judgment and decree. He was told next day what stamps to produce and he produced them on the 8th. He was told that copies would be ready on 20th and they were delivered to him on that day, so that the time required for obtaining these copies was 14 days.

Then instead of appealing against the decree he filed a regular suit in the Subdivisional Court for accounts. It is difficult to understand what he wanted, as he referred only to transactions which had been dealt with in the suit in the Township Court. This suit for accounts was filed on 28th November and on 15th December the Sub-divisional Judge held that the suit was not maintainable and that the defendant-respondent's remedy was to appeal against the Township Court's decree. Instead of doing so at once, he waited for eight days and then on 23rd December applied for and obtained a copy of the Subdivisional Judge's judgment, though this was in no way necessary for the purpose of appeal, The Courts were after that closed for

the Christmas holidays. Again he did not appeal on the first day on which the Courts were opened, but on 4th January he filed a miscellaneous application in which he asked for permission to appeal, though the time for appealing had elapsed. It is not clear from the proceedings whether he filed his memorandum of appeal at the same time or not. In the appellate record, the appeal is stated to have been presented on 3rd February. That was the date on which the District Judge passed orders on the miscellaneous application, and as the memorandum of appeal is dated the 3rd January 1912 it is possible that it was filed at the same time as the application. The District Judge heard the application ex parte and passed orders admitting the appeal. Notice was then issued to the plaintiff-applicant and the appeal was disposed of on the merits, the question of limitation not being considered again. The Township Court's decree was reversed and the suit dismissed.

The plaintiff-applicant has now applied for revision on various grounds, but the preliminary point of limitation has been argued first.

The procedure followed in the District Court was wrong. The defendant-respondent should have filed his memorandum of appeal and in it stated the grounds on which he asked it to be admitted after time. After hearing him or his advocate the District Judge might have admitted the appeal provisionally, and then at the hearing gone into the question of limitation and heard what the other side had to say on the point.

It is argued for the defendant-respondent that the admission of an appeal after time is a matter of discretion and that the discretion of the lower Appellate Court should not be interfered with on second appeal. It has been said that discretion when applied to a Court of law means discretion guided by law. It must be governed by rule and not by humour. It must not be arbitrary, vague and fanciful but legal and regular. The reasons given by the learned District Judge for admitting the appeal after time are given in the following words: "It is explained on behalf of the applicant that he did not understand the law and thought the proper Court to apply to was the Sub-divisional Court. The Sub-divisional Court indicated to him his error. Excluding the time between the date of institution in the Subdivisional Court (28th November 1911) and the date the copy of the Subdivisional Court's judgment was obtained (15th December) (sic)—and I think in the circumstances this period should be excluded—the appeal would appear to be within time."

The learned District Judge apparently had in mind S. 14, Lim. Act. This section does not apply to appeals, but I have no doubt that the circumstances contemplated in that section would generally be held to be sufficient cause within the meaning of S. 5. But the District Judge omitted to consider whether the ground on which the Subdivisional Court was unable to entertain the defendant-respondent's suit was of a like nature as defect of jurisdiction. The High Court of Allahabad has held that the presentation of an appeal to the wrong Court through a mistake in ignorance of law is not a sufficient cause. The High Courts are however not agreed upon this point. But in this case the defendant respondent made a worse mistake than appealing to the wrong Court. He did not attack the decree at all but filed a fresh suit. Again the learned District Judge omitted to consider whether the proceeding which the defendant-respondent prosecuted in the Subdivisional Court was prosecuted with good faith, i. e., with due care and attention. Had he exercised even the most ordinary care, would he not have discovered that his remedy was to appeal to the District Court?

Again, the learned District Judge failed to consider whether the defendant-respondent had been guilty of any laches after he had been informed of his proper remedy by the Subdivisional Court. As it took 14 days to obtain copies of the Township Court's judgment and decree, the time for appealing expired on 15th December, i. e., the day on which the Subdivisional Judge informed the defendant-respondent of his proper remedy. Had the defendant-respondent acted promptly then, his appeal would have been only a few days out of time. but instead of doing so he did nothing until the last day before the holidays commenced and then he applied for a copy of the Subdivisional Judge's judgment which was not required. Even

after that he was guilty of further laches in that he did not file his appeal on the first day on which the Courts opened.

As the learned District Judge passed orders without going into any of these matters, it cannot be said that the discretion which he exercised was a judicial discretion and I think interference is justified.

Furthermore the District Judge acted under a mistake of fact. He says that if the period occupied in prosecuting the suit in the Subdivisional Court be excluded, the period allowed for appealing would have expired on 6th January, but that is not correct.

In the passage from the District Judge's order quoted above he says: "Excluding the time between the date of the institution in the Subdivisional Court and the date the copy of the Subdivisional Court's judgment was obtained." But as this last date is given as 15th December, which was the date on which the Subdivisional Judge's judgment was passed, a copy being supplied on the 23rd, I think the period the District Judge intended to deduct was the period between the date of institution and the date of judgment; obviously under no circumstances could defendant-respondent be allowed to deduct the time between the date of judgment and the date on which he thought fit to apply for a copy of it. Thus allowing 18 days for the time spent in the Subdivisional Court and 14 days for obtaining copies of the Township Court's judgment and decree and the usual 30 days, we have a total of 62 days; and even if the one day necessary for obtaining a oopy of the Subdivisional Court's judgment, though that copy was not required, be added, the total becomes 63 days and the last day for filing the appeal would be the 3rd January 1912, whereas the application for permission to appeal was filed on 4th January 1912. Had the District Judge not made a mistake in his calculation, I hardly think that he would have admitted the appeal.

The decree of the lower appellate Court is set aside and that of the Township Court restored with all costs.

K.N./R.B. *Decree set aside.*

A. I. R. 1914 Upper Burma 51

SHAW, J. C.

Nga E—Defendant—Appellant.

v.

Nga Aung Thein— Plaintiff— Respondent.

Second Appeal No. 125 of 1914, Decided on 19th October 1914.

(a) Buddhist Law (Burmese)—Inheritance—Dhammathats give one-fourth to orasa son — Orasa son does not include minor sons.

Where the Dhammathats give the eldest son a right to one-fourth as against the mother on the death of the father they refer to the orasa son, or in other words, the eldest capable son. Hence, where all the sons are minors, there is no orasa son, and the right in question does not accrue. [P 52 C 2]

(b) Buddhist Law (Burmese) — Widow — Widow is full owner of her three-fourth share —It passes on her death to her heirs —Creditors can attach and sell it.

With an orasa son, the widow would have full power to dispose of the remaining three-fourths, and on her death without alienating that share it would come down to heirs. But her creditors proceeding against her estate would be at liberty to attach and sell it. [P 52 C 2]

Lutter – for Appellant.

S. Mukerjee—for Respondent.

Judgment.—On 14th May 1913, appellant, Nga E, instituted a suit in the Township Court against Nga Kaung and three minor children of his deceased wife, Mi E Me, as Mi E Me's legal representatives and by guardian ad litem to recover Rs. 265-8-0 on two promissory notes purporting to be signed by Nga Kaung and Mi E Me.

The Court granted the appellant a decree for the amount claimed, directing that half should be paid by Nga Kaung and half by the estate of Mi E Me. This on 28th May 1913.

On 2nd June 1913, appellant applied for execution by the attachment of a house. On 4th June the house was attached and on 5th August following it was sold. Meanwhile on 2nd June 1913, plaintiff-respondent, by his next friend, Po Thwe, instituted a suit against his stepfather, Nga Kaung, and his minor brother and sister for a share of inheritance, claiming among other things a half of three-quarters of the house already mentioned which he valued at Rs. 200.

The Township Court excluded the house from the estate liable to partition on the ground that it was under attachment. This on 30th July 1913.

On appeal by the plaintiff-respondent against the Township Court's findings in

respect to the house, the lower appellate Court directed the appellant to be joined as a defendant and remanded the case for issues to be tried as to whether the house was attached for a lawful debt. The Township Court then joined the appellant as a defendant and tried issues, viz., "for whose debt was the house attached" and "what amount was realized by the sale of the house," and found that the deceased, Mi E Me, raised loans jointly with Nga Kaung in order to cover the expenses of litigation in which Nga Kaung was engaged, and that the amount realized by the sale was Rs. 170.

The lower appellate Court then modified the Township Court's decree by directing that Nga Kaung and the defendant-appellant should pay Rs. 42-8-0 to the plaintiff-respondent as his share of the price of the house.

The learned Additional Judge's reasoning is not very easy to follow. With an old Lower Burma ruling in his mind, instead of *Ma Min Tha* v. *Ma Naw* (1), he said that Mi E Me had an absolute right to dispose of a half-share of the house and consequently her creditors would be justified in attaching that half-share, but that as regards the other half she had only a right to take care of it and could not sell it except for her children's benefit: hence as the debt she contracted was not for the children's benefit the defendant-appellant could not attach it. He then proceeded to say that if Mi E Me had left the house intact and without any debt, then plaintiff-respondent and his brother as children of the first marriage would have been entitled to three-fourths of the house, but that if Nga Kaung and his son were allowed one-fourth of the remaining half, an injustice would be done to plaintiff-respondent and his brother. For "had it not been for Nga Kaung's mischievous acts, plaintiff-respondent and his brother would have got three-fourths of the whole house." He therefore allowed plaintiff-respondent the value of one-fourth of the house.

The first point for determination is whether plaintiff-respondent as the eldest son had a right to one-fourth. If he had, Mi E Me of course could not have a lienated that one-fourth: and after her death the creditors could not attach and sell that as estate left by Mi E Me.

(1) [1892-96] 2 U. B. R. 581.

I think it is clear on a perusal of the texts contained in S. 30 of the Kinwun Mingyi's Digest, Vol. 1, that where the Dhammathats give the eldest son a right to one-fourth as against the mother on the death of the father they refer to the orasa son, or in others words, the eldest capable son: see *Tun Myaing* v. *Ba Tun* (2). It follows that where all the sons are minors there is no orasa son, and the right in question does not accrue. That is the case here. Plaintiff-respondent, the eldst son, was a minor.

The next point is as to the right of the widow. If the plaintiff respondent has been the orasa, Mi E Me would have had full power to dispose of the remaining $\frac{3}{4}$ths. This was laid down authoritatively in *Ma Min Tha* v. *Ma Naw* (1), already cited, and the point was recently investigated anew and the previous conclusion affirmed in *Mi Saw Myin* v. *Mi Shwe Thin* (3). And when Mi E Me died without alienating that share, it would have come down to her heirs. But her creditors proceeding against her estate would have been at liberty to attach and sell it. The Additional Judge was altogether in error in supposing that Mi E Me could only dispose of her property for the benefit of her children, and still more so in supposing that a creditor proceeding against her estate could not attach and sell the property unless the debt was incurred for the benefit of the children.

As plaintiff-respondent had no right to $\frac{1}{4}$th the whole of the house was Mi E Me's and descended to her heirs, and there was nothing to prevent defendant-appellant from attaching and selling the whole of it. It follows that plaintiff-respondent could not claim any share of the house or any part of the sale proceeds from defendant-appellant. His rights along with his brother as a child of the former marriage as against his stepfather so far as the house was concerned did not arise, as the whole house having been sold and the whole proceeds of the sale having been exhausted in satisfying defendant-appellant's debt nothing remained for partition between the children of the former marriaga and their stepfather.

(2) [1903-04] 2 L. B. R. 292.
(3) [1912] 1 U. B. R. 125=15 I. C. 919.

In this view of the case it is unnecessary to touch upon other points that have been raised.

The decree of the lower appellate Court is set aside and plaintiff-respondents's claim so far as regards the house is dismissed.

Plaintiff-respondent will pay defendant-appellant's costs.

K.N./R.K. *Decree set aside.*

A. I. R. 1914 Upper Burma 53

SHAW, J. C.

Nga Hla Gyaw and *another* —Plaintiffs—Appellants.

v.

Mi Ya Po and *others* —Defendants—Respondents.

Second Appeal No. 21 of 1914, Decided on 7th September 1914.

(a) Civil P. C. (5 of 1908), Sch. 2, Para. 15 (1) (a)—Submission to arbitration cannot be revoked without good cause—Absence of notice of meeting to party already withdrawing does not invalidate award.

Neither party to a submission to arbitration can revoke it unless for good cause shown. [P 54 C 1]

Omission to give notice of the meeting of arbitrators to a party, who has prior to such meeting notified to the arbitrators his withdrawal from the submission, does not invalidate the award. [P 54 C 1]

The arbitrators are not bound to discuss in presence of the parties what award they are going to make. [P 54 C 1]

(b) Civil P. C. (5 of 1908), Sch. 2, Para. 20 —Procedure under para. 20 is not obligatory—Suit to enforce award lies—Ad valorem court-fee is payable—Court-fees Act, (7 of 1870), S. 7 (10) (d).

The procedure laid down in the Civil Procedure Code, Sch. 2, para. 20, is not obligatory. Instead of applying that an award may be filed, a party may institute a regular suit to enforce the award. For such a suit the court-fee would be ad valorem on the value of the property in dispute [S. 7 (10) (d). Court-fees Act,] and the period of limitation is three years at least; in some land cases it may be twelve years and there is free right of appeal and second appeal. [P 53 C 2]

C. G. S. Pillai—for Appellants.

L. K. Mitter and *D. Dutt*—for Respondents.

Judgment.—Plaintiffs-appellants sued to enforce an award of arbitration, in other words, for specific performance of an award. The plaint was quite plain. It did not mention Sch. 2, Cl. 20, Civil P. C., or ask that the award might be filed in Court, but prayed that the award might be enforced and a decree pronounced in acordance with it. The procedure laid down in the Civil Procedure Code is not obligatory. Instead of applying that an award may be filed, a party may institute a regular suit to enforce the award.

The distinction is important. The court-fee on an application to file an award is eight annas, the court-fee in a suit to enforce an award is ad valorem on the value of the property in dispute: S. 7 (10) (d), Court-fees Act.

In the case of an application to file an award the period of limitation is six months and there are stringent restrictions on appeal: see Sch. 2, Cl. 21, (2), and S. 104 (2), Civil P. C. In the case of a regular suit to enforce an award the period of limitation is three years at least, in some land cases it may be twelve years, and there is free right of appeal and second appeal.

The Courts below were in error in not observing this distinction and in speaking of the case as an application to file an award. There is the less excuse for them that the matter was explained long ago in *Nga Pu* v. *U De Wainda* (1), *Kyan Pon* v. *Yon Nyein* (2) and *Mi Hla Win* v. *Shwe Yan* (3).

In the present case the parties on the 15th February 1912 by a written submission referred the partition of their inheritance to arbitrators, Tha Do and Po Se. On the 22nd April, the arbitrators pronounced an award in favour of plaintiffs-appellants. Before the hearing of the case the defendants-respondents gave the arbitrators notice that they withdrew from the reference, and they did not attend the hearing or the delivery of the award. The arbitrators on receiving the notice proceeded ex parte without replying to the defendants-respondents' notice.

The defence to the plaintiffs-appellants' suit was that the award was invalid because it dealt with a piece of land which was not included in the reference because defendants-respondents had no notice of the date on which the arbitrators intended to proceed with the case (ex parte) and because defendants-respondents had withdrawn from the reference.

The Subdivisional Court found against the defendants-respondents on all points

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(1) [1892-96] 2 U. B. R. 11.
(2) [1897-1901] 2 U. B. R. 10.
(3) [1897-1901] 2 U. B. R. 293.

and ordered the award to "be filed" (sic) and a decree to issue in accordance therewith. The District Court on appeal, set aside that order and decree and "dismissed the suit" (sic) with costs.

The grounds on which the District Court came to this decision were that the arbitrators had omitted to reply to the defendants-respondents' notice or to make them aware of the date of the ex parte hearing, and that the arbitrators did not discuss in the presence of the parties what award they were going to make. This last ground was not raised by the defendants-respondents and was entirely unsustainable. The arbitrators were in no way bound to discuss in presence of the parties what award they were going to make. They deposed that they discussed the matter together and that one of them, Tha Do, drew up the award and signed it and sent it for signature to the other arbitrator, Po Se, who then signed it. This was a perfectly legitimate method of preparing the award.

On other points also the lower appellate Court's decision cannot be supported. As the learned Additional Judge observed: "When parties have agreed to submit a dispute to arbitration no party can revoke the submission unless for good cause shown, and a mere arbitrary revocation is not permitted." This was laid down by the Privy Council in *Pestonjee Nusserwanjee* v. *Maneckjee and Co.* (4). The subject is fully explained in Banerji's Law of Arbitration in India, 1908, at p. 118.

It has also been clearly laid down that the omission to give notice of the meeting of the arbitrators to a party who has, prior to such meeting, notified to the arbitrators his withdrawal from the submission, does not invalidate the award. The case of *Subraya Prabhu* v. *Manjunath Bhakta* (5), where this was declared to be the law, was very like the present case.

The defendants-respondents had no right to withdraw; they have never attempted to show that they had. It was their business to attend before the arbitrators, and when they failed to do so, it was not incumbent on the arbitrators to give them any further notice. This was the position on general principles and apart from any special stipulation in the reference. The reference in the present case however expressly provided that if either party failed to appear before the arbitrators, the arbitrators might proceed ex parte.

The decree of the lower appellate Court is set aside and the plaintiffs-appellants are granted a decree in terms of the award as prayed.

Defendants-respondents will pay the plaintiffs-appellants' costs.

K.N./R.K. *Decree set aside.*

(4) [1867-69] 12 M. I. A. 112=10 W. R. 51=2 Suth. 164=2 Sar. 390=20 E. R. 283 (P. C.)

(5) [1906] 29 Mad. 44.

A. I. R. 1914 Upper Burma 54

SHAW, J. C.

Mi Saw Bwin—Plaintiff—Appellant.

v.

Nga San Nyun—Defendant—Respondent.

Second Appeal No. 331 of 1914, Decided on 13th November 1914.

Buddhist Law — Divorce — Suit for bare divorce does not lie.

According to the Buddhist law of divorce, a suit for bare divorce would not lie. [P 54 C 2]

The Privy Council ruling in 11 *I. C.* 497 does not affect the decision in 8 *I. C.* 477. [P 56 C 2]

C. G. S. Pillay—for Appellant.

J. N. Basu—for Respondent.

Judgment.—Plaintiff-appellant sued for divorce on the ground of the defendant-respondent's misconduct. The original plaint was written by a petitioner and prayed for bare divorce. At the first hearing plaintiff-appellant having obtained the assistance of an advocate applied for an adjournment in order to file an amended plaint, the advocate no doubt being aware that a suit for bare divorce according to the ruling of this Court in *Nga Chit Nyo* v. *Mi Myo Tu* (1), would not lie. Plaintiff-appellant accordingly filed an amended plaint. This was not very well expressed, but I think it was intended to contain a prayer for divorce with partition. In para. 4 the plaintiff said that in view of the defendant's misconduct, she was entitled to divorce "either according to the method of divorce where the defendant is in fault, or according to the method of divorce by mutual consent and in para. 5 that there was joint property

(1) [1910] I U. B. R. 30=8 I. C. 477.

according to the schedules attached, and in para. 6, that " if divorce were granted according to the method of divorce by mutual consent, the joint property should be divided equally. The prayer also ran : " Therefore the plaintiff prays for a decree against defendant for divorce either according to the method of divorce where there is fault (on the part of the defendant) or according to the method of divorce by mutual consent together with costs. The amended plaint also had annexed to it schedules of property and debts.

All this seems to indicate clearly an intention to claim partition according to the rule of Buddhist law applicable to the particular circumstances of the case. If the Township Court had any doubt on the point it ought to have required the plaintiff at once to amend the plaint.

The defendant-respondent in his written statement admitted that there was joint property as alleged by the plaintiff-appellant though he denied some items, and filed a schedule of his own.

The Additional Judge of the Township Court framed two issues both badly expressed : (1) " Is there any fault on the part of defendant to entitle plaintiff to a decree for divorce " and (2) " Are the schedules presented by the plaintiff and the defendant true ?"

The first of these issues shows that the Additional Judge had not grasped the principles of the Buddhist law of divorce as explained in the ruling of this Court. It ought, of course, to have been: Was there any fault on the part of the defendant to entitle plaintiff to a decree for divorce with partition as in the case where the defendant is the offender (that is where the whole of the joint property goes to the plaintiff), and then there ought to have been another issue : Was there any fault on the part of the defendant to entitle plaintiff to a decree for divorce with partition as in the case of mutual consent [the rule applicable where the fault is less serious as in the case of *Nga Pye* v. *Mi Me* (2)]. The plaintiff might still have sued for a divorce with partition, resigning all the property to the defendant in the case where there was no fault on the part of the defendant: *Mi Kin Lat* v. *Ba So* (3). But she did not ask for this.

(2) [1902-03] 2 U. B. R. Budd. Law, Div. 6.
(3) 1904-06] 2 U. B. R. Budd. Law, Div. 3.

The Township Court found that there was no joint property and that " therefore a suit for bare divorce would lie " and holding that there was ill treatment granted a decree for bare divorce. This finding involved a misapprehension of what, as already explained, the actual nature of the suit as disclosed in the amended plaint was probably intended to be, and is not intelligible on the face of the pleadings and the evidence, or consistent with the rulings already referred to.

The defendant-respondent appealed to the District Court on the grounds that according to the evidence of both parties, it was clearly proved that there was joint property, that a suit for bare divorce without partition would not lie, and that the Court of first instance was wrong in granting a decree in favour of the plaintiff without any fault on defendant's part. The lower appellate Court citing *Nga Chit Nyo's* case (1) held that a suit for bare divorce would not lie, and therefore "following that ruling, the Additional Judge allowed the plaintiff to amend the plaint by adding a prayer for partition and directed the plaintiff to pay the costs of the appeal. The learned Additional Judge, besides failing to notice that the amended plaint was apparently intended to claim a divorce with partition as already explained, allowed himself to be misled by the final order in *Nga Chit Nyo* v. *Mi Myo Tu* (1), as given in the printed report of the case. He omitted to observe that in that case the Courts below had not only granted a decree for divorce, but had decided which rule of partition was to be applied, and he failed to observe that his order allowing the plaintiff to amend the plaint could not be a final disposal of the appeal in the present case, where there had been no finding as to the method of partition to be applied. The order however as it stands is a final order and it was followed by a decree, and therefore the present second appeal undoubtedly lies in this Court.

The grounds on which the plaintiff-appellant comes here are that a suit for bare divorce does lie according to the ruling of the Privy Council in *Maung Pe* v. *Lon Ma Gale* (4), and that the lower

(4) [1911] 38 Cal. 629=6 L. B. R. 18=11 I. C. 497=38 I. A. 140 (P.C.).

appellate Court ought to have decided the appeal on the merits and confirmed the decree of the Court of first instance.

On the first point the learned advocate for the plaintiff-appellant, as will be evident from what has gone before seems to have misapprehended the real nature of the plaintiff-appellant's amended plaint, but he has also entirely failed to appreciate what points were in dispute before their Lordships of the Privy Council and what they actually decided.

If the view which I take of the amended plaint in the present case is correct the question does not really arise. But as the plaint is not as clear as it ought to be, it seems necessary to explain the ruling in *Maung Pe* v. *Lon Ma Gale* (4) and to come to a decision as to whether it affects the ruling in *Nga Chit Nyo* v *Mi Myo Tu* (1).

There had been a suit for bare divorce which had proceeded to decree, and the successful party had followed it up by a second suit for partition. It was this second suit which was before the Judicial Committee of the Privy Council. The plaintiff of course maintained that the decree in the first suit was a valid one, and the defendant took the ground that the first decree being valid, the second suit was barted by O. 2, R. 2. It was not therefore the case of either party that the first suit was incompetent and the point for determination in the appeal before the Privy Council was whether assuming the first decree to have been valid, the second suit was barred by O. 2, R. 2. Their Lordships decided that O. 2, R. 2 did not apply to a case of the kind and they made some general observations in regard to divorce and partition which probably apply to most systems of marriage law but are not consistent with the peculiar provisions of the Burma Buddhist Marriage law, which were evplained in *Nga Chit Nyo* v *Mi Myo Tu* (1). These provisions were not brought to the notice of the Privy Council. They were not put in issue by either party and their Lordships did not consider them or come to any decision upon them. It follows that the intervention of the Privy Council was invoked on a point which, as explained in *Nga Chit Nyo's* case (1), cannot arise in a suit for divorce between Burman Buddhists. This is an unfortunate circumstance for which the parties in the Lower Burma case or their advocates are responsible. But the result is that the decision in *Maung Pe* v. *Lon Ma Gale* (4) does not affect the decision of this Court in *Nga Chit Nyo* v. *Mi Myo Tu* (1).

The decree of the lower appellate Court is set aside. The plaintiff-appellant is required now to amend the amended plaint slightly so as to make it quite clear that she is praying for divorce and partition, and the case is remanded under O. 41, R. 23, read with O. 42, to the District Court for disposal of the appeal on the merits.

A certificate will be granted under S. 13, Court-fees Act.

Costs will abide the final result.

K.N./R.K. *Appeal allowed; Case remanded.*

A. I. R. 1914 Upper Burma 56

MC COLL, A. J. C.

Mi Saing—Plaintiff—Appellant.

v.

Nga Yan Gin—Defendant—Respondent.

Civil Appeal No. 200 of 1913, Decided on 11th May 1914.

Buddhist Law (Burmese)—Marriage—Second divorce after reunion by mutual consent—Parties are again to be treated as bachelor husband and maiden wife—Rules of partition between them enunciated.

When a couple reunite after a divorce they revert to the status quo ante; and if at the time of the first marriage they were bachelor and maiden, they must be treated on a second divorce as nga-lin ngwe-maya and not as eindaunggyis, i. e., as bachelor husband and maiden wife and not as widower and widow. On a divorce by mutual consent between eindaunggyis, the rules of partition would be as follows: (1) each takes his or her payin property; (2) if they were equally matched as regards property at marriage, the property acquired after marriage otherwise than by inheritance is equally divided between them; (3) if one of the parties brought the bulk of the property to the marriage and the other comparatively little then on the principle of nissayo and nissito the supporter gets two-thirds of the jointly acquired property and the dependant one-third; and (4) if one of the parties inherits property during the marriage he or she gets two-thirds of the property on the same principle.

[P 58 C 2, P 59 C 1]

C. G. S. Pillay—for Appellant.

S. Mukerjee—for Respondent.

Judgment.— The plaintiff-appellant sued the defendant-respondent for a divorce and a partition of property on the ground of cruelty.

The latter is wealthy and the former is the daughter of poor parents. He married her when she was a young unmarried girl of 15. He was 38 years older and had been married before.

This was in 1261 or 1262. Between then and the institution of this suit there were two divorces and reunions. The defendant-respondent appears to be a very uxorious person to use a mild term, because in the course of these years he is said to have taken six wives, all of whom he divorced after a short time and he admits having taken four girls to wife after the plaintiff-appellant. All of these were divorced and they got little or no property on divorce. They were probably daughters of poor parents like the plaintiff-appellant and made no fuss. Possibly they were concubines and not wives. If they were wives they must have been either very ignorant of their rights or exceedingly anxious to be quit of the defendant-respondent at all costs. The latter evidently hoped to be able to treat the plaintiff-appellant in the same way as he did them and in fact did so on the occasion of the two previous divorces because he obtained her signature to documents by which she agreed to accept Rs. 100 on one occasion and jewellery worth Rs. 70 and clothes worth Rs. 30 on the other in full satisfaction of he claim for a partition of property.

No doubt it was these facts that led the learned Additional Judge of the District Court to suspect that the plaintiff-appellant was not a wife but a concubine, and he therefore framed an issue on this point. But the issue was quite unnecessary. The defendant-respondent never explicitly denied plaintiff-appellant's allegation that she was his wife, and he subsequently admitted that she lived with him openly as his wife and that he treated her as such. The fact however that the defendant-respondent is rich and the plaintiff-appellant poor is no reason why she should not get the full rights to which she is entitled. The parties come within the description "Husband rich, wife poor" given in the Manukye Dhammathat, and to quote that authority: "These different kinds of husbands and wives have been enumerated above that their separate classes may be known, but though the class be different they have become man and wife and the law makes no difference with regard to their separation. It must be noted that what has been said above regarding the separation of a man and wife, both the children of nobles, is the law for all."

Again with reference to one kind of slave wife: "Let the wife' the party not wishing to separate, take the whole of the property animate and inanimate, acquired after they became man and wife and let the husband pay the debts mutually contracted during the same time. Why is this? Also for another reason; because he voluntarily raised her to the rank of wife with the full knowledge of her being a slave."

The last reunion between the parties lasted only 20 days. The defendant-respondent then beat the plaintiff-appellant and the latter left him and prosecuted him and he was fined Rs. 50.

The learned Additional Judge of the District Court has held that this last reunion must be taken as the starting point in determining the rights of the parties, that they must be treated as eindaunggyis and that as duriug the twenty days this marriage lasted no property was acquired there can be no joint property, and each party is entitled to take back what he or she brought to the marriage and as the plaintiff-appellant brought nothing she is entitled to nothing. He followed *Mi Dwe Naw* v. *Maung Tu* (1) in which it was held that where there had been a divorce and a reunion it was the date of the reunion that had to be taken as the starting point when determining the rights of the parties on a subsequent divorce and said: "I must hold that where husband and wife both assent to divorce and no fault is proved, each is entitled to take back property brought at marriage." In this passage the learned Additional Judge adopted some of the exact words used in the ruling cited above though they do not exactly apply in the present case because the plaintiff-appellant's case was that the defendant-respondent had been guilty of cruelty, but no doubt as the plaintiff-appellant merely claimed that the cruelty had only been such as

(1) S. J. L. B. 14.

entitled her to a divorce as by mutual consent the different between the two cases would not signify.

Mi Lwe Naw v. *Maung Tu* (1) was cited with approval in *Maung Shwe Lin* v. *Mi Nyein Byu* (2) which was also relied upon by the Additional Judge. He however overlooked the ruling *Mi Myin* v. *Nga Twe* (3) in which, after explaining the principle of nissayo and nissito, the learned Judicial Commisioner said: "The rule of nissayo and nissito seems to be equally applicable to persons who have been married before." The rule just laid down was that in the case of persons, neither of whom had been married before, if they stood to each other in the relation of supporter and dependant the latter on divorce obtained one-third of the former's payin property, and that when one spouse inherited property during marriage he or she was considered a nissayo in respect of that property. If that rule applies in its entirety to persons who have been married before then even assuming that the parties in the present case are to be regarded as eindaunggyis, the plaintiff-appellant must be entitled to one-third of the property, which the defendant-respondent brought to the last reunion.

But the remark of the learned Judicial Commissioner quoted above was an other dictum because in that case the parties had not been married before. The principle of nissayo and nissito is elearly indicated in the texts collected in S. 257 of U Gaung's Digest, Vol. 2, but it is applied differently. In the case of eindaunggyis the principle appears to be only applied to the property acquired after marriage, not to payin property. The only text which in the English translation appears to imply the contrary is the one from the Dhamma which runs as follows: "If the husband and wife both of whom have been previously married, mutually desire to divorce neither of them being in fault, let each take his or her property brought to the marriage and liquidate his or her debt, if any contracted before the marriage. The property acquired jointly shall, if they were equally matched at the time of marriage in respect of property and means, be divided equally between them. Debts, if any contracted jointly, shall be liquidated in the same way. If the husband alone brought property and debts to the marriage, or inherited them after the marriage the whole of their property and debts shall be divided into three shares; he shall take two shares and the wife one share. If the wife alone brought or inherited property and debts she receives two shares and the husband one share." The words "the whole" however are an addition of the translator's. The translation ought to run: "The husband shall take 2/3rds of the property and good and bad debts." What property is meant is not stated explicitly, but seeing that it is with reference to the partition of the lettetpwa property that the words are used it seems probable that it is that property that is meant. This text would then agree with the other texts and the rules for partition on divorce by mutual consent between eindaunggyis would be:

(1) Each takes his or her payin property, always; (2) if the parties were equally matched as regards property at marriage the property acquired after marriage otherwise than by inheritance is equally devided between them; (3) if one of the parties brought much property to the marriage and the other little then on the principle of nissayo and nissito the supporter gets 2/3rds of the jointly acquired property and the dependant one-third; (4) if one of the parties inherits property during the marriage he or she gets 2/3rds of that property on the same principle.

If these rules are to be applied to the present case it is clear that the plaintiff-appellant can get little or nothing, as very little property can have been acquired during the twenty days that the last reunion lasted, and there is no allegation that the defendant-respondent inherited any property during that period.

But the Lower Burma rulings on which the lower Court relied are merely based on general principles; no authority is given for the decisions. There are now available texts which were not available then.

The texts collected in S. 323 of the Digest, Vol. 2, lay down that if a husband and wife reunite after a divorce and a partition of their property they commit no fault; and two of those texts have a

(2) S. J. L. B. 175.
(3) [1906] U. B. R. Budd. Law. Div. 19.

direct bearing on the point now being considered.

The Wunnana lays down that in the case of such a reunion the parties shall possess exactly the same rights as they had originally without the slightest difference. *Pine-dine-yin-ma-kin-ta-cho-pine-gya-myo-e.** It is very emphatic. The text from the Rasi, though not so emphatic, appears to lay down the same thing.

Though no definite reference is made to property the words "*ma-kin-ta-cho* would be meaningless if the parties only partially resumed their previous rights. It is clear that what is laid own is that there is to be a complete restoration of the status quo ante, and consequently if they had never been married before at their first marriage they are to be regarded as nge-lin nge-maya on their reunion and not as eindaunggyis.

I think such a rule is perfectly intelligible and equitable and as there is the authority of two texts for it and no authority on the other side that I am aware of except the two Lower Burma rulings cited above, which were based on general principles and not on texts, I think this rule should be followed,

The parties therefore must stand on the same footing as they would have done had there been no divorce.

Now as I have said the plaintiff-appellant was a maiden when she married the defendant-respondent, whereas the latter had been married before; and there are no texts in the Dhammathats which provide for a divorce by mutual consent between two such persons. The texts collected in S. 261 of U Gaung's Digest, Vol. 2, refer to divorces against the will of one party and are evidently supplementary to the general rule that either party can claim a divorce against the will of the other on surrendering all the joint property and paying the joint debts and provide for the case where no joint property has been acquired. In *Ma E Nyun* v. *Maung Tok Pyu* (4) it was held that in the case of a divorce between a man who had been married before and a woman who had not, the woman could not equitably be placed in a worse position than she would have been in had her husband not been previously married and that therefore the divorce should be regulated by the rules prescribed for couples, neither of whom had been previously married. The reasons given for this decision appear to me to be very sound and in the absence of any text opposed to the decision it certainly should be followed.

That the plaintiff-appellant is entitled to a divorce as by mutual consent there can be no doubt whatever. It appears that whenever the plaintiff-appellant has given birth to a child the defendant-respondent has insisted upon the child being at once given away to another, with the result that out of four children only one is now alive. That in itself was a crime against the maternal instinct and must have caused the plaintiff-appellant both mental and bodily pain. In the next place he has accused her of infidelity and has not substantiated his accusation. In the case of the only accusation that appears to have any substance in it, I would remark that if the child born in 1268 was not the defendant-respondent's it must have been conceived during the period of the first divorce, at a time when the plaintiff-appellant owed no fidelity to the defendant-respondent. If this child were not conceived during the period of divorce there is obviously not the slightest reason for supposing that it was not the defendant-respondent's child. In this connexion I would remark that the deposition of one Maung Nge given in another case and the confession of one Pon Nya, were wrongly admitted in evidence as it was not shown that S. 33, Evidence Act, in the one case or S. 32, Evidence Act, in the other, applied. Finally the defendant-respondent has been guilty of violence towards the plaintiff-appellant and has on that account been convicted and fined by a criminal Court and has not even proved any extenuating circumstances. It was this violence which led to the final separation and the present suit. The case is very similar to *Mauug Pye* v. *Ma Me* (5), and in accordance with that ruling the plaintiff-appellant is entitled to a divorce as by mutual consent.

It follows that she is entitled on divorce to 1/3rd of the property which

* The translation is as follows:—In the case of a reunion the parties shall possess exactly the same rights as they had originally without the slighest difference.—*Ed.*

(4) [1897 1901] 2 U. B. R. 39.

(5) [1902-03] 2 U. B. R. Bud. Law Div. 6.

the defendant-respondent brought to the marriage, when he married her for the first time in 1262 and to half of the property acquired during her coverture. If he acquired any property during the periods of divorce that property should I think in the absence of any authority on the point be treated as his thinthi property, as the plaintiff-appellant had had no share in its acquisition.

As the Additional Judge held that the plaintiff-appellant was entitled to no property he did not go into these points and therefore a remand is necessary.

The suit is accordingly remanded to the District Court for the trial of the following issues:

(1) What property did the defendant-respondent bring to his first marriage with the plaintiff-appellant? And what is its value?

(2) What property was acquired by the parties during their marriages? And what is its value?

(3) How much of these two classes of property remained at the time the suit was instituted? And what is its value?

The proceedings to be returned with findings within two months.

K.N./R.K. *Case remanded.*

END

THE

ALL INDIA REPORTER

1914

NAGPUR SECTION

CONTAINING

FULL REPORTS OF ALL REPORTABLE JUDGMENTS OF THE **NAGPUR JUDICIAL COMMISSIONER'S COURT** REPORTED IN

(1) 10 NAGPUR LAW REPORTS (2) 15 CRIMINAL LAW JOURNAL

(3) 22 to 25 INDIAN CASES

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IN GRATEFUL RECOGNITION OF

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NAGPUR JUDICIAL COMMISSIONER'S COURT

1914

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THE

ALL INDIA REPORTER

1914

NAGPUR J. C.'s COURT

NOMINAL INDEX

Absence of Star denotes Cases of Provincial or Small Importance.
*** Indicates Cases of Great Importance.**
*** * Indicate Cases of Very Great Importance.**

A

Abdul Husen v. Emperor 1
Akola Gin Combination v. Northcote Ginning Factory 26

B

Balkishan v. Atmaram 8
*Balu Bai v. Tanu Bai. 21
Bapu v. Bhiwaji 82
Bhadia v. Mt. Bhagi 52
Bhagwan v. Emperor 70
Bukharam v. Ramji 20

D

Dhansingh v. Ganpat 14

F

Fagwa v. Budhram 48

G

Ganpatrao v. Jangia 65
Gokal Singh v. Kanhayalal 57

H

Haijnath v. Raghunath 84
Hari v. Sridhar 16
Haria v. Manakchand 87
Husen v. Rajaram 75

J

Jaigopal Chowbe v. Rameshwar 47
Jairam v. Sunderlal 63
Jamna Das v. Paiku 66
Jiwanlal v. Chudaman 54

K

Kekra v. Sadhu 58
Khemchand v. Malloo 32

M

Machal v. Matru 6
Manjula, Mt. v. Shankar 73
Miya Saheb v. Champa Lal 62
*Mukundram v. Dayaram 44
Murlidhar v. Jagannath 4

N

Nagorao v. Nago 31
Nanheylal v. Mt, Ranibahu 68(1)
Narayan v. Mahadeo 79
Nemasa v. Ramkrishna 77

P

Pusu v. Emperor 7

R

Ramchandra v. Mt. Radha 19
Ram Gulam v. Bala Prasad 36
Raghu v. Madhgia 60
Raghunath v. Ganpat 72
Rajaram v. Vithal Rao 68(2)
Ramdayal v. Motiram 74

S

Sambhasheo v. Mahadeo 55
Sheo Lal v. Mt. Sheorajia. 81
Shioshankarpuri v. Emperor 40

T

Tikaram v. Ghasiram 38

U

Umraosingh v. Suganchand 13

V

Vishwanath v. Sitaram 71

Z

Zingu v. Gosawi 3

THE

ALL INDIA REPORTER

1914

NAGPUR J. C.'s COURT

SUBJECT INDEX

Absence of Star denotes Cases of Provincial or Small Importance.
*** Indicates Cases of Great Importance.**
*** * Indicate Cases of Very Great Importance.**

A

Adverse Possession
——Limited owner—Assertion of absolute ownership is acquired **81***a*
——Limited owner—Hindu widow acquires only limited interest **81***b*
——Civil P. C. (1882), S. 263—Compliance with S. 263 is interruption of judgment-debtor's adverse possession **14**

B

Berar Land Revenue Code (1896)
——**S. 69**—S. 69 is not abrogated by S. 54, T. P. Act—Relinquishment is subject to prior mortgage—Procedure under S. 68 is exhaustive and registration is not required **3**

C

C. P. Land Revenue Act (18 of 1881)
——**S. 65-A (as amended upto 1898)**—Precarious leasehold is property—Entry in certificate under S. 65-A is not conclusive whether property is joint or separate—Status of protected thekedar acquired by joint family funds—Property is joint—Priority of zamindar's contract does not affect rights of members inter se—Amending Act of 1898 is not retrospective **48***a*
——**S. 66**—Duties are to be performed by all members and not only by one in whose name certificate stands **48***c*

C. P. Tenancy Act (9 of 1883)
——**S. 38 (2)**—"Interest" explained **72***a*
——**S. 38**—Notice to landlord of all usufructuary mortgages is not necessary **72***b*
——**Ss. 47, 48, 60, 71 and 72**—Suit for ejectment—Sublease for more than a year cannot be pleaded **71**

C. P. Tenancy Act
——**S. 46**—Mortgage prior to Act—Sale decree cannot be passed against occupancy rights **62***a*
——**S. 85**—Ejectment can be ordered with respect to holding of which arrears are not paid and not other holdings **38***b*

Civil Procedure Code (14 of 1882)
——**S. 263**—Compliance with S. 263 is interruption of judgment-debtor's adverse possession **14**
——**(5 of 1908)**
——**S. 11 and O. 9, R. 8**—Dismissal under R. 8 does not operate as res judicata **20***b*
——**S. 99**—Order impliedly amounting to one of redemption may be treated as such under S. 99 **8***b*
——**S. 105**—Scope of S. 105—Findings forming basis of appealable order but not appealed from become res judicata **58***a*
——**S. 105 (1)**—Order extending time under O. 34, R. 3, is not appealable and can be challenged in appeal from final decree **8***a*
——**O. 1, R. 9**—Suit by Hindu on mortgage in father's name without impleading other brothers on ground of partition—Suit held liable to be dismissed not for nonjoinder but because rights of parties could not be decided **31**
——**O. 6, R. 17**—Rule of not allowing amendment adding barred fresh relief does not apply when amendment is at instance of defendant **77***a*
——**O. 6, R. 17**—Amendment relates back to date of institution of suit **77***b*

Civil P. C.
——**O. 6, R. 17**—Appellate Court can allow amendment even after limitation request if is made within time in original Court **77***c*
——**O. 9, R. 8** and **S. 11**—Dismissal under R. 8 does not operate as res judicata **20***b*
——**O. 9, R. 9**—Bar of suit by plaintiff under R. 9 operates only against defendants actually present **20***a*
——**O. 22, R. 4**—Decree—Setting aside—Suit against widow but in name of dead co-widow—Widow accepting summons—Case is one of misdescription and widow is bound by decree—Pleadings **73**
——**O. 34, R. 3** and **S. 105 (1)**—Order extending time under O. 34, R. 3 is not appealable and can be challenged in appeal from final decree **8***a*
——**O. 34, R. 3**—"Good cause" should be liberally construed in favour of defendant for first extension—Good cause cannot be presumed—For subsequent extension stronger case is necessary **8***c*
——**O. 34, R. 3**—Final decree either for redemption or foreclosure must be drawn up **8***d*
——**Sch. 2, para. 15**—Reference in respect of debts on mortgage on other deeds—Reference covers lease for old debts **74***a*

Companies Act (6 of 1882)
——**S. 4 (1)**—"Persons" in S. 4 (1) meant individuals and not corporate bodies **26***a*
——**S. 4 (2)**—Association of more than 20 firms formed for commercial gain requires registration **26***b*

Criminal P. C. (5 of 1898)
——**Ss. 4 (m)** and **476**—Execution is judicial proceeding within S. 476—Sanction without probability of conviction should not be granted **40**
——**S. 250**—Order of compensation cannot be made subsequently while discharging other co-accused—Irregularity cannot be cured by Criminal P. C. (5 of 1898), S. 537 **68 (1)**
——**Ss. 476** and **4 (m)**—Execution is judicial proceeding within S. 476—Sanction without probability of conviction should not be granted **40**
——**Ss. 476** and **439**—High Court has power to set aside prosecution order passed under S. 476—But want of judicial opinion by lower Court and not mere disagreement with lower Court's opinion is ground for interference **1***a*

Criminal P. C.
——**S. 476**—Only reasonable prospect of conviction is required under S. 476 **1***b*
——**Ss. 526** and **528**—Reasons for transfer of criminal case—Susceptibilities of litigant likely to create reasonable apprehension that fair and impartial trial shall not be had are sufficient **6**
——**Ss. 537** and **250**—Order of compensation cannot be made subsequently while discharging other co-accused—Irregularity cannot be cured by S. 537 **68 (1)**

D

Decree
——Setting aside—Suit against widow but in name of dead co-widow—Widow accepting summons—Case is one of misdescription and widow is bound by decree—Pleadings—Civil P. C. (1908), O. 22, R. 4 **73**
——Setting aside—Proof—In suit for setting aside decree passed as against minor burden of proof is on person alleging majority **57**

Deed
——Construction—Mortgage with possession of malikana rights amounts to hypothecation **36**
——Construction—Charge and mortgage—Word "gahn" does not determine whether deed is mortgage or charge—Words and Phrases **32***d*

E

Evidence Act (1 of 1872)
——**S. 32**—Unwritten dying declaration may be proved by oral evidence **70***a*
——**S. 32 (2)**—Statement by deceased scribe of a bond as to marks (nishani) of executant are admissible being made in ordinary course of business as bond-writer **87**
* ——**S. 34**—What are books of account and when they can be called to be regularly kept explained—Entry in account books is always admissible but weight to be attached differs—Regular keeping of accounts if denied has to be formally proved **44**
——**S. 115**—Subsequent mortgagee joined after limitation at his request—Suit is barred against him though he is estopped from pleading limitation—Order joining him should be set aside—Limitation Act (1908), S. 22 **79**
——**S. 159**—Police officer testifying to dying declaration can refresh from his notes **70***b*

H

Hindu Law

— Alienation—Widow in Berar—Alienation to pay more than double the principal will not be upheld **19**

——Debts — Son's liability — Father's reference—In absence of fraud or collusion, is binding on other members **74***b*

—— Joint family — Joint property remains so—Even right of partition is taken away by subsequent statute **48***b*

— Joint family—Property purchased by savings from thekadari in name of only one member is joint **48***d*

— Joint family— Undivided share in ancestral family money-lending business cannot be attached in execution of decree against one brother personally **13***a*

* ——Partition—Sisters—Survivorship—Sisters can by agreement effect partition to extinguish survivorship leaving reversion unaffected **21***a*

——Succession — Daughter-in-law in Bombay does not succeed as absolute owner nor does she in Berar **81***c*

— Succession—Sister is preferable to uncle's son in Berar **52**

Hyderabad Assigned Districts Courts Law (1889)

——**Ss. 57 (2) (d)** and **9 (1) (a)**—Assistant Commissioner exercising power of Deputy Commissioner for trying suits is not District Court for appointing guardian—Appointment of guardian by him is ultra vires **82***a*

I

Interpretation of Statutes

——Statute clear—Even vested rights can be divested **62***b*

—— Word bears same meaning **58***b*

J

Jurisdiction

——Small Cause Court has no jurisdiction to attach half share in joint family property, consisting partly at least of immovable property **13***b*

L

Landlord and Tenant

— Landlord alone can accept surrender or create tenancy — Presumption that lambardar is agent of proprietary body is not applicable when lambardar is minor **84**

——Lambardar — Partition proceedings instituted—Lambardar's power as agent of proprietary body does not cease **47**

——Partition of holding effected with mutual consent — Settlement officer's order is not necessary **38***a*

— Penal Code (45 of 1860), S. 98—Fallen tree belongs to malguzar—Force used to remove it is in right of private defence **7***a*

——Lambardar is entitled to sue to set aside voidable transaction **4**

Limitation Act (9 of 1908)

——**S. 12**—Time requisite for copies how to be calculated pointed out—Duties of person applying for copies pointed out—Principal cannot get credit for agent's laches—Rules are mandatory—Application for copies must be accompanied with costs—Costs received late owing to delay in post office—Application deemed presented when money reached office—Time taken by post office for reaching application and money and copies back to applicant would not be excluded **60**

——**S. 22**—Evidence Act (1872), S. 115—Subsequent mortgagee joined after limitation at his request—Suit is barred against him though he is estopped from pleading limitation—Order joinin him should be set aside **79**

——**Art. 91**—Art. 91 does not apply where sale is void **75***b*

——**Art. 109**—Actual receipt of profits is starting point **65**

M

Majority Act (9 of 1875)

——**S. 3**—Order of Court without jurisdiction is nullity **82***b*

Minor

——Alienation by guardian de facto is void and need not be set aside in suit for possession **75***a*

Mortgage

——Usufructuary — Covenant to appropriate profits after payment of revenue by way of annual interest—Revenue must be paid by mortgagee in spite of loss—Inquiry as to by whose negligence land lay fallow is precluded—Who should pay enhanced assessment depends on terms of contract **16***a*

O

Occupancy Holding

——Transfer of, without landlord's consent is voidable **63**

P

Penal Code (45 of 1860)

——**S. 98**—Fallen tree belongs to malguzar—Force used to remove it is in

Penal Code
right of private defence—Landlord and Tenant **7***a*
Pleadings
——Decree—Setting aside—Suit against widow but in name of dead co-widow—Widow accepting summons—Case is one of misdescription and widow is bound by decree **73**
Possession
——Title — Possession is presumed to follow title **7***b*
Practice
——Precedent—Judge is not bound to decide on analogy of decision on similar facts **21***b*

R

Registration Act (16 of 1908)
——**S. 17**—Maintenance grant to Hindu widow need not be in writing **54**

S

Specific Relief Act (1 of 1877)
——**S. 9**—Question of title is immaterial—On basis of possession even true owner can be ejected **55**

T

Transfer of Property Act (4 of 1882)
——**Ss. 58** and **100** — Distinction between charge and mortgage is that in latter way of disposal of property on default is decided — Distinction between simple mortgage and charge with respect to right to sell security pointed out **32***b*
——**Ss. 58** and **100**—Distinction between charge and simple mortgage — Simple mortgage rendered invalid for proper attestation does not create charge—Document creating charge though believed to be mortgage remains unaffected for want of proper attestation **32***c*
——**Ss. 63** and **72 (b)**—Mortgagee in possession constructing well not separable in use neither necessary for preservation from deterioration must go with the land to mortgagor after redemption **68 (2)**
——**S. 68 (a)**—Usufructuary mortgage—Possession resumed by mortgagor — Personal covenant to pay interest revives **16***b*
——**Ss. 72 (b)** and **63**—Mortgagee in possession constructing well not separable in use neither necessary for preservation from deterioration must go with the land to mortgagor after redemption **68 (2)**
——**Ss. 100** and **59** — Attestation of deed creating charge can be made on acknowledgment by executant **32***a*
——**Ss. 100** and **58**—Distinction between charge and mortgage is that in latter way of disposal of property on default is decided—Distinction between simple mortgage and charge with respect to right to sell security pointed out **32***b*
——**Ss. 100** and **58** — Distinction between charge and simple mortgage—Simple mortgage rendered invalid for proper attestation does not create charge—Document creating charge though believed to be mortgage remains unaffected for want of proper attestation **32***c*
——**S. 115** — Surrender — Mortgagee's rights are not affected **38***c*

W

Waste Land Rules (1876)
——Permanent lease — To secure premium—Mortgage to ijaradar for limited terms — On expiry of term village becoming khalsa and mortgagor declared occupant of survey number—Subsequent mortgage by him—Ijaradar's mortgage held enforceable against subsequent mortgagee also **66**
Words and Phrases
——Deed — Construction—Charge and mortgage — Word "gahn" does not determine whether deed is mortgage or charge **32***d*

THE

ALL INDIA REPORTER

1914 NAGPUR

COMPARATIVE TABLES

(PARALLEL REFERENCES)

Hints for the use of the following Tables

Table No. I—This Table shows serially the pages of INDIAN LAW REPORTS, for the year 1914 with corresponding references of the ALL INDIA REPORTER.

Table No. II—This Table shows serially the pages of other REPORTS and JOURNALS for the year 1914 with corresponding references of the ALL INDIA REPORTER.

Table No. III—This Table is the converse of the **First** and **Second Tables**. It shows serially the pages of the ALL INDIA REPORTER for 1914 with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

TABLE No. I

Showing seriatim the pages of NAGPUR LAW REPORTS, for the year 1914 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of 10 NAGPUR LAW REPORTS.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

10 Nagpur Law Reports=All India Reporter.

N.L.R.	A. I. R.			N.L.R.	A. I. R.			N.L.R.	A. I. R.			N.L.R.	A. I. R.			N.L.R.	A. I. R.		
1	*Old Case*			32	1914	*N*	77	72	1914	*N*	31	108	1914	*PC*	48	150	1914	*N*	8
5	1914	*N*	4	35	,,	,,	81	74	,,	,,	74	111	,,	*N*	54	159	,,	,,	71
8	,,	,,	68	38	,,	,,	7	76	,,	,,	65	112	,,	*PC*	1	161	,,	,,	82
9	,,	,,	16	39	,,	,,	20	78	,,	,,	3	129	,,	*N*	38	166	,,	,,	68
15	,,	,,	6	42	,,	,,	62	81	,,	,,	32	133	,,	,,	75	170	,,	,,	66
17	,,	,,	13	44	,,	,,	44	89	,,	,,	47	137	,,	,,	57	173	,,	,,	79
19	,,	,,	70	51	,,	,,	21	91	,,	,,	19	139	,,	,,	60	177	,,	,,	40
21	,,	,,	72	60	,,	,,	14	93	,,	,,	84	144	,,	,,	73	185	,,	,,	36
24	,,	,,	52	64	,,	,,	48	98	,,	,,	26	146	,,	,,	63	188	,,	,,	55
28	,,	,,	58																

TABLE No. II

Showing seriatim the pages of other REPORTS, JOURNALS and PERIODICALS for the year 1914 with corresponding references of the ALL INDIA REPORTER.

15 Cr. L. J. & 22 to 25 Indian Cases=All India Reporter.

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1914 Lahore.**

N. DAR, B. A. LL. B.,
Vakil High Court,
SRINAGAR (Kashmir)

TABLE No. III

Showing seriatim the pages of ALL INDIA REPORTER, 1914 NAGPUR with corresponding references of other REPORTS, JOURNALS and PERIODICALS including the INDIAN LAW REPORTS.

N. B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1914 NAGPUR.

Column No. 2 denotes corresponding references of other REPORTS and JOURNALS.

A. I. R. 1914 Nagpur=Other Journals

A.I.R.)	Other Journals			A.I.R.)	Other Journals			A.I.R.)	Other Journals			A.I.R.)	Other Journals		
1	9	*N L R*	184	20	23	*I C*	878	54	10	*N L R*	111	70	23	*I C*	195
	22	*I C*	177	21	10	*N L R*	51		26	*I C*	835		15	*Cr L J*	243
	15	*Cr L J*	33		24	*I C*	808	55	10	*N L R*	188	71	10	*N L R*	159
3	10	*N L R*	78	26	10	*N L R*	98		27	*I C*	506		26	*I C*	708
	24	*I C*	868		26	*I C*	613	57	10	*N L R*	137	72	10	*N L R*	21
4	10	*N L R*	5	31	10	*N L R*	72		26	*I C*	816		23	*I C*	213
	23	*I C*	20		24	*I C*	831	58	10	*N L R*	28	73	10	*N L R*	144
6	10	*N L R*	15	32	10	*N L R*	81		23	*I C*	238		26	*I C*	830
	22	*I C*	980		26	*I C*	601	60	10	*N L R*	139	74	10	*N L R*	74
	15	*Cr L J*	196	36	10	*N L R*	185		26	*I C*	819		24	*I C*	863
7	10	*N L R*	38		27	*I C*	498	62	10	*N L R*	42	75	10	*N L R*	133
	23	*I C*	704	38	10	*N L R*	129		23	*I C*	888		26	*I C*	813
	15	*Cr L J*	352		26	*I C*	810	63	10	*N L R*	146	77	10	*N L R*	32
8	10	*N L R*	150	40	10	*N L R*	177		26	*I C*	698		23	*I C*	165
	26	*I C*	701		27	*I C*	545	65	10	*N L R*	76	79	10	*N L R*	173
13	10	*N L R*	17		16	*Cr L J*	161		24	*I C*	866		26	*I C*	720
	23	*I C*	156	44	10	*N L R*	44	66	10	*N L R*	170	81	10	*N L R*	35
14	10	*N L R*	60		23	*I C*	893		26	*I C*	715		23	*I C*	719
	24	*I C*	850	47	10	*N L R*	89	68(1)	10	*N L R*	8	82	10	*N L R*	161
16	10	*N L R*	9		26	*I C*	606		23	*I C*	498		26	*I C*	709
	23	*I C*	131	48	10	*N L R*	64		15	*Cr L J*	290	84	10	*N L R*	93
19	10	*N L R*	91		24	*I C*	855	68(2)	10	*N L R*	166		26	*I C*	608
	26	*I C*	598	52	10	*N L R*	24		25	*I C*	712	87	11	*N L R*	9
20	10	*N L R*	39		23	*I C*	229	70	10	*N L R*	19		27	*I C*	866

THE
ALL INDIA REPORTER
1914
NAGPUR J. C's COURT

A. I. R. 1914 Nagpur 1

HALLIFAX, A. J. C.

Abdul Husen—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn No. 190 of 1913, Decided on 6th October 1913, against order of Subdivisional Magistrate, Hoshangabad, D/- 15th August 1913.

(a) Criminal P. C. (5 of 1898), Ss. 476 and 439—High Court has power to set aside prosecution order passed under S. 476—But want of judicial opinion by lower Court and not mere disagreement with lower Court's opinion is ground for interference.

The High Court has power in revision to set aside an order for prosecution under S. 476, Criminal P. C. But the High Court ought not to interfere in revision merely on the ground that it disagrees with the opinion of the lower Court, but only when it appears that the lower Court has acted on merely fanciful grounds, on grounds so empty, so obviously wrong that it could not be said to have formed a serious judicial opinion : 26 *Mad.* 98 and 26 *All.* 249, *Diss. from* ; 3 *I. C.* 934; 4 *N. L. R.* 140 ; 4 *I. C.* 710 ; 23 *All.* 249 and 26 *Bom.* 785, *Rel. on.*

[P 2 C 2]

(b) Criminal P. C. (5 of 1898), S. 476—Only reasonable prospect of conviction is required under S. 476.

Section 476 only requires that there must be a reasonable prospect of a conviction. It is not necessary for the Magistrate, before ordering prosecution, to try the whole case and be absolutely satisfied that the accused cannot by any possibility escape a conviction.

[P 3 C 1]

F. W. Dillon—for Applicant.

G. P. Dick—for the Crown.

Judgment. — The Subdivisional Magistrate of Hoshangabad on 15th August 1913, passed an order, under S. 476, Criminal P. C., against Abdul Husen Bohra, which the latter now seeks to have set aside in revision. Throughout his order, the learned Magistrate speaks of " sanctioning " the prosecution, though it is clear that he acted, and knew that he was acting, under S. 476, in which the word " sanction " does not occur. This confusing of S. 476 with the four last subsections of S. 195, Criminal P. C., is lamentably common, and frequently leads to more serious mistakes than a mere misuse of terms, which is the extent of the mischief here. It is mainly due to what I have always regarded as the misplacing of S. 476 in the Code. S. 195 (1) lays down that no Court shall take cognizance of certain offences " except with the previous sanction, or on the complaint," of certain public servants or certain Courts. It is not necessary to prescribe any procedure for the granting of sanction or the making of a complaint by a public servant, and nothing more is said about that. Sub-Ss. 2 and 3 are merely explanatory of the first.

There remain then two heads of the subject to be dealt, with the granting of sanction by a Court and the making of a complaint by a Court. The former is fully treated in the last four subsections of S. 195, and it would certainly be a more convenient and logical arrangement if the second main head of the subject were discussed in the following subdivisions of the same section. It appears instead in S. 476, which is one of a somewhat miscellaneous collection of sections dealing with proceedings in case of certain offences affecting the administration of justice. The confusion that so often arises on this subject would disappear if Magistrates would regard the first three subsections of S. 195, the last four subsections of S. 195 and the two subsections of S. 476 as the three subdivisions of one section, the first laying down the

two main subjects to be dealt with, sanctions and complaints, the second dealing with sanctions and the third with complaints.

For the Crown, it is objected in the first place that this Court has no power to interfere in revision with an order passed under S. 476, Criminal P. C., because it is a complaint. The authorities quoted are the Madras case of *Eranholi Athan* v. *King-Emperor* (1) and the Allahabad case of *In the matter of the petition of Bhup Kunwar* (2). In the former case, it was held that an order under S. 476 is itself a complaint, and, therefore cannot be revised. This was overruled by a Full Bench of the same Court in *In re Ottupura Narayanan Somayajipad* (3), and the view expressed was also dissented from by all the Judges in the case of *In the matter of the petition of Bhup Kunwar* (2). There Stanley, C. J., and Blair, J., held that the High Court cannot interfere in revision under the Criminal Procedure Code with an order passed by a civil or revenue Court, but apparently agreed that it could interfere with such an order passed by a criminal Court. Banerji, J., held that it could be revised, whatever Court it was passed by, and that view has been held by this Court in *Shankar Rao* v. *Shaik Daud* (4). There is abundant authority of all the other High Courts to the same effect, and I should not have thought the matter was open to question. I need only mention the Calcutta ruling of *Jadunandan Singh* v. *Emperor* (5), the Allahabad case of *In the matter of Alamdar Husain* (6) and *In re Bal Gangadhar Tilak* (7) from Bombay.

It has however to be remembered that the jurisdiction I am now asked to exercise is a revisional, not an appellate jurisdiction. The Criminal Procedure Code allows an appeal against an order granting sanction to prosecute passed under S. 195 but not against an order that a prosecution shall be instituted passed under Ss. 195 and 476, and the distinction must be taken to be intentional and to have a meaning. The principles which must guide the Court in dealing with an application of this nature were well and clearly laid down by Strachey, C. J., in *In the matter of Alamdar Husain* (6). Speaking of the order of a Collector, the learned Chief Justice said : "The condition of his acting under S. 476 is his forming the opinion that there was ground for inquiring into any offence referred to in S. 195. The test is his opinion, and not the opinion of any superior Court ; and if he has formed a real opinion to the effect stated, he has power to act under the section, and he commits no error or irregularity in doing so, even though another Court may think the opinion erroneous. I say, if he forms a real opinion, because, no doubt, if a case arose in which the Court acted on merely fanciful grounds, on grounds so empty, so obviously wrong that it could not be said to have formed a serious judicial opinion at all, then this Court would probably hold in revision that there had been no such action as S. 476, contemplates. The opinion spoken of by S. 476, no doubt, is a judicial opinion founded on evidence. If such an opinion has been formed, this Court ought not in revision to interfere merely on the ground that it disagrees with it : the case must go on."

In the present case, the applicant Abdul Husen Bohra appeared as a witness for the defence in a case in which one Ram Prasad was eventually convicted of having forged a certain document on 10th November 1912. Abdul Husen then stated that he had seen the document about 10 days before Diwali, that is to say about 30th October. He was careful not to say that he was certain the document he saw was identical with the one shown to him in Court, but he described it as exactly similar in all details. The Magistrate who tried the forgery case, very thoroughly and carefully, has now, after a full consideration of the matter, formed and expressed an opinion that Abdul Husen's statement was entirely and intentionally false and that there is a reasonable probability of his being convicted of perjury. Even if I disagreed with that opinion, I should be unable to set aside the order based upon it. But I do not. Two matters have been urged by the learned counsel for the applicant as showing conclusively that

(1) [1903] 26 Mad. 98.
(2) [1904] 26 All. 249.
(3) [1909] 33 Mad. 48=3 I. C. 934.
(4) [1908] 4 N. L. R. 140.
(5) [1909] 37 Cal. 250=4 I. C. 710.
(6) [1901] 23 All. 249.
(7) [1902] 26 Bom. 785.

the prosecution cannot possibly end in a conviction. One is that it is quite possible that Ram Prasad went round before 10th November showing the applicant and other people of position a document exactly similar to that which he subsequently forged, by way of creating evidence, of what is commonly known as peshbandi. It is pointed out that Ram Prasad was in possession of another piece of paper similar to that on which the forged document was written at his arrest, and had had ample opportunity of obtaining many other similar pieces of paper before, and that there may well have been previous experiments less satisfactory than that of 10th November, one of which was shown to Abdul Husen and others.

That this is not a very probable hypothesis is shown by the fact that it was never even suggested to the Magistrate when the applicant was called upon to show cause why he should not be prosecuted. There are many arguments both for and against it, and all I need say at present is that the hypothesis is not so highly probable that it must necessarily be accepted at the trial of the applicant. It is reasonably probable that its possibility may be completely disproved and that is all that is required to justify the prosecution. The other argument advanced is that no motive has been suggested in the applicant or any of the other persons of wealth and position for committing perjury in the defence of a person in the position of Ram Prasad. It is quite possible the motive is not far to seek, but want of proof of motive cannot of itself defeat a charge.

Finally, I must point out that S. 476 requires the Magistrate to form an opinion " that there is ground for inquiring into any offence referred to in S. 195." This has been rightly and fairly interpreted to mean that there must be a reasonable prospect of a conviction, because without that there could not be ground for another Magistrate to waste his time in holding the inquiry. But the section does not say that before a Magistrate orders a prosecution he must try the whole case and be absolutely satisfied that the accused cannot by any possibility escape a conviction. The application for revision is rejected.

P.N./R.K. *Application rejected.*

A. I. R. 1914 Nagpur 3

MITTRA, OFFG. A. J. C.

Zingu—Appellant.

v.

Gosawi—Respondent.

Second Appeal No. 278-B of 1913, Decided on 20th January 1914, from decree of Additional Dist. Judge, West Berar, D/- 23rd April 1913.

Berar Land Revenue Code (1896), S. 69—S. 69 is not abrogated by S. 54, T. P. Act—Relinquishment is subject to prior mortgage—Procedure under S. 68 is exhaustive and registration is not required.

Under S. 69, Berar Land Revenue Code, 1896, a registered occupant may, by giving a notice in writing to Tahsildar, relinquish the occupancy either absolutely, or in favour of a specified person.

The section has not been abrogated by the Transfer of Property Act, and hence, a transfer of occupancy rights under it is not governed by the provisions of S. 54 of the Act.

Where the occupant had already mortgaged the holding, relinquishment of the holding in favour of a specified person would take effect subject to the prior mortgage.

The procedure laid down by the Berar Land Revenue Code seems to be exhaustive and does not contemplate the registration of any document for the creation of occupancy rights under the Government. [P 4 C 1, 2]

M. R. Bobde—for Appellant.

M. R. Dixit—for Respondent.

Judgment. — The plaintiff sues for redemption of a mortgage of two survey numbers in Berar. The mortgagor, one Tolya, was the registered occupant of the fileds. According to the plaint, Tolya orally sold the fields to the plaintiff in consideration of Rs. 900. In pursuance of this agreement, Tolya gave a razinama (Ex. P-2) to the Tahsildar and the plaintiff gave a kabuliyat (Ex. P-3) to the same officer in respect of both the fields. There is also on the record a certified copy of an order by the Naib Tahsildar on 13th May 1908 transferring the khata of the fields to the name of the plaintiff. The plaintiff further alleges that he was put in possession by Tolya. At the date of this transaction, the Transfer of Property Act was applicable to Berar (Notification No. 1138, dated 16th May 1907). Both the Courts below have dismissed the suit on the ground that the oral sale was inoperative in view of the provisions of S. 54, T. P. Act. It is perfectly clear that a sale as such could only be effected by a registered instrument as the consideration was above Rs. 100. But the Courts below are wrong in holding that the plaintiff acquired no right to redeem

under the razinama and kabuliyat referred to above. The case of *Chokhey Singh* v. *Jote Singh* (1), relied on by the lower appellate Court, lays down that mutation of names in itself creates no proprietary title. This ruling would apply to malguzari villages in the Central Provinces but not to raiyatwari land in Berar.

Under S. 69, Berar Land Revenue Code, 1896, a registered occupant may, by giving a notice in writing to the Tahsildar, relinquish the occupancy either absolutely, or in favour of a specified person. The argument that the Transfer of Property Act has in effect repealed this section, as regards relinquishment in favour of a specified person, is unsound. That Act merely lays down that a particular kind of transfer—a sale—can only be created by observing certain forms, but it does not say that results somewhat similar to those flowing from such a transfer cannot be attained under the authority of another Act, without observing the form laid down by the Transfer of Property Act. This is a case for the application of the maxim '*generalia specialibus non derogant.*' The relinquishment in favour of a specified person does not carry with it all the incidents of a sale under the Transfer of Property Act. For example, the implied covenants provided for by S. 55, have no application to such a relinquishment. I hold that S. 69, Berar Land Revenue Code, has not been abrogated by the Transfer of Property Act by implication. Now, the Berar Land Revenue Code clearly recognizes the right of the occupant to mortgage his holding, so far as the class of holdings I am dealing with is concerned. That Code equally recognizes the right of the occupant to relinqish the holding in favour of a specified person, provided there are no arrears of land revenue due at the time of the relinquishment. As the occupant had already mortgaged the holding, he could relinquish only his equity of redemption. The person in whose favour the relinquishment has been made must take it subject to the prior mortgage. The plaintiff therefore cannot take free of that mortgage and can only redeem the defendant's mortgage by virtue of the relinquishment in his favour.

(1) [1909] 31 All. 73=1 I. C. 166=12 O. C. 288=36 I. A. 38 (P. C.).

It is argued that the razinama and the kabuliyat are inadmissible in evidence for want of registration in view of S. 17, Registration Act. But what is called a razinama is merely a notice of relinquishment given under the powers conferred by S. 69. It is not an instrument in the sense in which that term is used in the Registration Act. In other words, it is not a surrender in pursuance of a contract. The registered occupant has exercised a privilege conferred on him by the Code, and this he is entitled to do without the concurrence of the Tahsildar if no arrears of land revenue are due. There is not much force in the argument that the Registration Act, S. 90, expressly exempts similar notices of relinquishment of occupancy under the Bombay Land Revenue Code, 1879. This was a superfluity and done '*ex cautela majore.*' As regards the kabuliyat it is merely an agreement to become the registered occupant (vide S. 73). The liability to pay the land revenue is created by S. 71 and not by any express agreement. It is not the counterpart of a lease "from year to year, or for any term exceeding one year or reserving a yearly rental," hence it is not necessary to have the kabuliyat registered. The liability to pay the land revenue is independent of the transfer of an interest in immovable property. It is a special kind of agreement specifically provided for by the Berar Land Revenue Code. The procedure laid down by the Code seems to be exhaustive and does not contemplate the registration of any document for the creation of occupancy rights under the Government.

The result is that the appeal succeeds. The decrees of the Courts below are reversed, and the case is remanded to the first Court for a fresh trial. The appellant will get the usual certificate for refund of court-fees. Other costs will follow the result.

P.N./R.K. *Case remanded.*

A. I. R. 1914 Nagpur 4

MITTRA, OFFG. A. J. C.

Murlidhar—Appellant.

v.

Jagannath—Respondent.

Second Appeal No. 403 of 1912, Decided on 26th August 1913, from decree of Dist. Judge, Narsinghpur, D/- 30th April 1912.

Landlord and Tenant—Lambardar.

A lambardar, as the customary agent of the proprietary body, is entitled to sue to set aside a voidable transaction: 6 *I. C.* 389 and 4 *N. L. R.* 45, *Dist.*; 11 *C. P. L. R.* 1, *Foll.* [P 6 C 1]

S. R. Pandit—for Appellant.

J. C. Ghosh—for Respondent.

Judgment.—The plaintiff and his two brothers, Debiprasad and Parmanand, are members of a joint Hindu family, of which the plaintiff is the manager. The plaintiff is the lambardar of the village of Khaira Kalla, which, according to the plaintiff, is owned by the three brothers. The defendants had pleaded that there are two other persons who are cosharers of the village. This plea was found against them in the first Court and in the appeal before the District Judge it was conceded that the existence of these two persons may be ignored for the purposes of this suit. The plaintiff is the lambardar of the village and claims to represent the entire proprietary body consisting of himself and his two brothers. The suit is to avoid a mortgage executed by some absolute occupancy tenants in the village, executed according to the plaintiff in contravention of S. 38, Tenancy Act, 1883, corresponding with S. 41 of the Act of 1898.

The plaintiff seeks ejectment of the defendants on the ground that the mortgage was invalid and that the defendants have obtained possession of the holding under a foreclosure decree against the original tenants. The defence was that the mortgage was consented to by the then landlord and that the plaintiff alone could not maintain the suit. The first Court held that the consent alleged was not proved and that the plaintiff as lambardar could maintain the suit without joining his brothers. The lower appellate Court, following the judgment of the Calcutta High Court in *Nilmoni Guntia* v. *Jogendra Guntia* (1), has dismissed the suit on the sole ground that the plaintiff as lambardar is not entitled to sue in his own name without joining his two brothers as coplaintiffs. The case cited was a case from the Sambalpur District and, no doubt, supports the view taken by the District Judge. The plaintiff has now preferred this second appeal on the ground that the lambardar as the customary agent of the proprietary body can bring a suit for the avoidance of the mortgage and for the ejectment of the transferees under a voidable title. I agree with Brett and Sharfuddin, JJ., in the above case that a lambardar, as a mere agent of the proprietary body in its relations with the Government, such as he is under the definition given in the Land Revenue Act, cannot represent his cosharers in the internal management of the village. But the attention of the learned Judges was never drawn to the fact that the lambardar is ordinarily the customary agent of the cosharers for such purpose.

I do not understand the Calcutta High Court to lay down—nor has it been suggested before me—that apart from statutory provisions enabling him to do so, a lambardar even if the customary agent, is not entitled to maintain a suit in his own name. Under S. 70, Land Revenue Act, the settlement officer shall ascertain the custom or rules by which the proprietors in each mahal are mutually bound as to the granting of pattas, the ejectment of tenants, the realization and distribution of rents and other profits, the payment of land revenue, village expenses and other charges, and generally as to the control and management of the mahal, and shall decide all disputes and record all agreements regarding the matters mentioned in this section. The Wajibularz of all districts recognize the customary authority of the lambardar to represent his cosharers in the management of the village. The Narsinghpur Wajibularz is particularly clear on the point. Under the heading "Extent to which cosharers are represented by Lambardars," it is there laid down that "the person who is appointed lambardar shall attend the Courts when there is business of the village to be done there, and shall be responsible for the leasing of land, the collection of rents, and the payment of the Government demand." Stevens, J. C., in *Pratap* v. *Umrao* (2), held that the lambardar was entitled to maintain a suit for rent, even though a portion had been paid to a cosharer.

The learned advocate for the respondents admits that the lambardar would represent his cosharers in a suit for rent, but contends that he cannot do so in a suit for ejectment and in support of this contention relies on *Ramji* v. *Syed Nur* (3). It seems to me that if he can represent

(1) [1910] 37 Cal. 694=6 I. C. 389.

(2) [1898] 11 C. P. L. R. 1.

(3) [1908] 4 N. L. R. 45.

others in one class of suits authorized by the Tenancy Act, he can equally represent his cosharers in the other class of suits. What was held in the lastmentioned case is that such a suit would fail on the merits, because the cosharers were not agreed as to the desirability of avoiding the transfer, and in that particular case, in view of the consent given to the transfer by other cosharers, the lambardar could not be held to represent the proprietary body. In the present case there is no allegation that the plaintiff's brothers ever consented to the transfer. In the very case cited by the learned Judges of the Calcutta High Court, apparently with approval, Ismay, J. C., remarked as follows: "Ordinarily the lambardar as the agent of the cosharers for the management of the village would be the person whose consent is necessary and sufficient. In the same way the lambardar acting on behalf of the proprietary body would be entitled to sue to set aside a voidable transaction." *Gopal* v. *Govind* (4). Further on, the learned Judicial Commissioner says that "anything which the Tenancy Act requires or authorizes a landlord to do must be done either by all the cosharers, acting together or by an agent authorised to act on their behalf." The agent here refers to the customary agent, the lambardar, as would be apparent from the earlier part of his judgment, expres authorization in such a case not being necessary.

It may be that in some cases it would be desirable to make all cosharers parties to a suit. In my opinion it was unnecessary in this suit to join the plaintiff's brothers in view of the pleadings, but the suit cannot fail for such nonjoinder.

The decree of the lower appellate Court is reversed and the appeal is remanded to that Court for trial on the merits. The appellant will be given the usual certificate for refund of court-fees. Other costs will follow the result.

P.N./R.K. *Appeal remanded.*

(4)[1900] 13 C. P. L. R. 113.

A. I. R. 1914 Nagpur 6

HALLIFAX, A. J. C.

Machal—Applicant.

v.

Matru—Complainant.

Criminal Misc. Petn. No. 54 of 1913, Decided on 15th November 1913, against order of Dist. Magistrate, Narsinghpur, D/- 21st October 1913.

Criminal P. C. (5 of 1898), Ss. 526 and 528—Reasons for transfer of criminal case—Susceptibilities of litigant likely to create reasonable apprehension that fair and impartial trial shall not be had are sufficient.

In deciding applications for transfer of criminal cases, the law has regard not so much to the motives, which might be supposed to bias the Judge as to the susceptibilities of the litigant parties. Where there is anything in the case likely to create in the mind of the accused a reasonable apprehension that he may not have a fair and impartial trial, the case should be transferred to another Magistrate. To decide what is reasonable, apprehension, regard must be had to the degree of intelligence possessed and the standard of honesty and impartiality observed by the accused : *Serjeant* v. *Dale*, (1877) 2 *Q. B. D.*558, *Foll.* [P 7 C 1]

Judgment.—The District Magistrate's reasons for refusing to transfer this case from the Court of Rai Sahib Motilal, Honorary Magistrate, are that the allegation that the complainant Matru is a friend of the Rai Sahib's is untrue and that the incident of the Rai Sahib having been falsely accused of assault fifteen years ago along with Matru is not likely to influence his decision in the case and that he will without doubt consider the evidence impartially. Happily all that might almost be assumed without the support of any statement by the Magistrate or of the judgment in the case in which he and Matru were co-accused. But there is a further matter which should have been considered before the application was rejected. In matters like these, to use the words of Lush, J., in *Serjeant* v. *Dale* (1), "the law, in laying down this strict rule, has regard not so much perhaps to the motives which might be supposed to bias the Judge as to the susceptibilities of the litigant parties. One important object, at all events is to clear away everything which might engender suspicion and distrust of the tribunal, and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security."

(1) [1877] 2 Q. B. D. 558=46 L. J. Q. B. 781=37 L. T. 153.

We have therefore to see whether there is anything in the case likely to create in the mind of the accused a reasonable apprehension that they may not have a fair and impartial trial. They say that they have that apprehension, and we may safely assume that they have. But is it reasonable? To decide that we must have regard to the degree of their intelligence and their standard of honesty and impartiality, both probably fairly low. The facts alleged are insufficient to raise in the mind of the District Magistrate even the shadow of an apprehension that he, even if he were in the position of the two accused persons, would not get a fair and impartial trial in the Court of Rai Sahib Motilal. But they have raised a very real fear of injustice in the minds of the accused, and having regard to their standards of honesty and fair dealing I find it impossible to say that such a fear is unreasonable in people of their class.

I am aware that many Magistrates regard a transfer of a case from their Court as, in some sense, a slur on their honour and impartiality. This is in practically every case an entirely wrong and distorted view. In this particular case the slur is entirely on the honesty of the applicants for a transfer because in order to grant it we have to assume that they themselves have so little honesty that they are incapable of believing in its existence in another even to the extent of not being influenced by the trivialities put forward here. The case will be transferred from the Court of Rai Sahib Motilal to that of such other competent Magistrate in the district as the District Magistrate may select.

P.N./R.K. *Petition allowed.*

A. I. R. 1914 Nagpur 7

MITTRA, Offg. A. J. C.

Pusu—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 196 of 1913, Decided on 19th September 1913, against order of Dist. Magistrate, Mandla, D/- 27th May 1913.

(a) Penal Code (45 of 1860), S. 98—Fallen tree belongs to malguzar— Force used to remove it is in right of private defence—Landlord and Tenant.

When a tree is blown down in the wind, the malguzar who is the owner of it becomes entitled to remove it and for this purpose he has a right of ingress over the tenant's land and a right of private defence of property in the fallen tree. [P 7 C 2]

(b) Possession—Title.

Possession is presumed to follow the title. [P 7 C 2]

C. S. Nayudu—for Petitioner.

Judgment.— The learned District Magistrate has found that the *ber* tree belonged to the Malguzar Pusu Patel, the applicant before me. When the tree was blown down in the wind, he became entitled to remove it and for this purpose he had a right of ingress over the tenant's land. The tenant did not object to the entry on the land, but to the removal of the tree. But if something, which I am about to refer to had not taken place, the malguzar would have had no right of private defence, and his duty would have been to resort to the authorities for redress. The tenant however had already cut the tree and stacked it, with a view to appropriating it to his own use. The land was in the possession of the tenant, but the tree, after its severance from the ground by the action of wind, must be deemed to be in the malguzar's possession, just as the minerals under the land are deemed to be in the possession of the Crown. Possession is presumed to follow the title. The act of the tenant was theft though if put on his trial, he would have been acquitted on the ground that he had no dishonest intention, having acted under a bona fide claim of right. The tenant apparently believed on hearsay evidence that his deceased father had planted the tree, though the village papers do not support him. But under S. 98, I. P. C. "when an act, which would otherwise be a certain offence, is not that offence by reason of any misconception on the part of that person, every person has the same right of private defence against that act which he would have if the act were that offence." The cutting of the tree took place on the very day of the alleged offence. The malguzar had apparently no previous notice of any such intention on the part of the tenant, so as to have time to have recourse to the protection of the public authorities. In my opinion the malguzar had a right of private defence of property. It is no answer to say that even if the wood had been burnt or otherwise disposed of the malaguzar could have brought a civil action. He is not bound

to do so, if the law gives him a right of private defence of property. The question remains for consideration whether the malguzar exceeded this right. The force used was very trivial. The complainant's story has been found to be false in some particulars. The learned District Magistrate describes the incident as an assault. None of the malguzar's servants, according to the findings, took any part in the affray. There were two men on the tenant's side struggling with the malguzar. P. W. 2 says: "The Malguzar Pusu Patel beat me and I beat him." In my opinion the force used was not more than what is justified by the law. The Tahsildar was wrong in referring to the previous convictions as they were irrelevant. I set aside the conviction and sentence passed by the lower Courts and acquit the applicant. The fine must be refunded to him.

P.N./R.K. *Accused acquitted.*

A. I. R. 1914 Nagpur 8

STANYON, A. J. C.

Balkishan—Decree-holder—Appellant.

v.

Atmaram and *others* -- Judgment-debtors--Respondents.

Second Appeal No. 281-B of 1913, Decided on 22nd July 1914, from decree of Addl. Dist. Judge, Akola, D/- 15th March 1913.

(a) Civil P. C. (5 of 1908), S. 105 (1)—Order extending time under O. 34, R. 3, is not appealable and can be challenged in appeal from final decree.

No appeal lies against an order extending time for the payment of mortgage money.

Where a non-appealable order is incorporated or results, in a decree, S. 105 (1), Civil P. C., allows the order to be questioned in an appeal from the decree. [P 9 C 2]

(b) Civil P. C. (5 of 1908), S. 99—Order of redemption.

Where the order of a Court amounts impliedly, though not expressly, to a redemption decree, it may be treated as such under S. 99, Civil P. C. [P 10 C 1]

(c) Civil P. C. (5 of 1908), O. 34, R. 3—"Good cause" should be liberally construed in favour of defendant for first extension—Good cause cannot be presumed—For subsequent extension stronger case is necessary.

Though no extension of time for payment of money in satisfaction of a foreclosure decree can be granted without "good cause," those words should be liberally interpreted with leniency towards the debtor in the case of a first enlargement. [P 10 C 2]

The "good cause" is not to be assumed either from nonpayment or delayed payment. O. 34, R. 3, requires that it should be shown to the satisfaction of the Court. [P 12 C 1]

For each extension of time, subsequent to the first, a stronger case must be made out. [P 12 C 1]

(d) Civil P. C. (5 of 1908), O. 34, R. 3—Final decree either for redemption or foreclosure must be drawn up.

Every preliminary decree in a mortgage suit must lead to a final decree, either of foreclosure or of redemption; and when a preliminary decree is followed by redemption, a final decree for redemption should always be drawn up. An order extending time merely opens the way to payment, and when the payment is duly made, a final decree for redemption is as necessary as is a final decree for foreclosure. Where payment is not made, one or the other is consequential of the terms of the preliminary decree. [P 13 C 1]

F. W. Dillon and *P. S. Kotval*—for Appellants.

J. Mittra and *M. Chuckerbutty*—for Respondents.

Judgment.—The facts material to this appeal are not in dispute. On 3rd May 1909, the appellant obtained a preliminary decree for foreclosure, the dies datus in which was 3rd November 1909. This decree was made by the District Court, reversing the decree of the first Court, dated 9th December 1908, which had dismissed the mortgage suit. Against the above preliminary decree the defendants who are the respondents now before me appealed to this Court. That appeal was dismissed on 29th June 1910. On 10th February 1911 the decree-holder applied for a final decree, on the ground that the decretal debt had not been paid on 3rd November 1909, as ordered by the preliminary decree a date which was not extended by this Court. Notice of the application for a final decree was issued to the judgment-debtors, calling upon them to appear on 6th May 1911, and show cause why the decree should not be made absolute. On 4th April 1911 one Ratan Bobde, professing to act on behalf of one of the judgment-debtors, Devidas, deposited the full decretal debt, namely, Rs. 236-6-11, in Court. Devidas had so far been a minor, but on 6th May 1911 he appeared, and stating that he had attained majority, asked for an amendment of the record so as to show him sui juris. The decree-holder also appeared and refused to receive the money deposited, pressing for the final decree claimed by him. Devidas asked the Court to extend the time and allow redemption. The case went to 22nd July 1911, on which date

a written statement was filed on behalf of Devidas of the reasons why time should be extended from 3rd November 1909 to 4th April 1911, when the money was paid into Court. The substance of the reasons given was this:

(1) Devidas was a minor when the preliminary decree was passed, and he paid as soon as he attained majority.

(2) The money had been offered to the decree-holder out of Court and refused.

(3) The Court had accepted the money before any final decree was passed.

(4) The parties had awaited the result of the final appeal, and it was the practice in Berar to pay the decretal sum after notice of an application for a final decree had been received by the judgment-debtor.

The first Court held these reasons to be sufficient for an extension of time, but made a somewhat confused order in these terms:

"Defendant 4 having taken proper steps to satisfy the plaintiff's claim by depositing in Court on 4th April 1911, the plaintiff should accept the same in payment of his claim in full. And in case he would decline to do so, defendant 4 is permitted to withdraw the money and pay it to the plaintiff within a week with interest at Rs. 6 per cent. per annum from 3rd November 1909 to the date of payment."

It is difficult to put any common sense into the second part of this order. The decree-holder appealed to the District Court, but the appeal was dismissed on 15th March 1913. The decree-holder has therefore made this second appeal. The appeal is stated to be against the order extending time and allowing redemption. The grounds of appeal are substantially as follows:

(1) The Courts below have failed to realize that they were bound to make the foreclosure decree final in the absence of proof of "good cause" for non-payment on the dies datus.

(2) The reasons stated for such non-payment did not constitute "good cause."

(3) Payment was wrongly allowed to be made by a third party who had no interest in the suit.

Though the point was not argued before me, it seems necessary to decide whether an appeal lies in this case. The order of the first Court extending time was an order made under O. 34, R. 3, Civil P. C., 1908, as applied to Berar. It is clear from the language of O. 43, R. 1 (o), read with S. 105 (1) of the same Code, that no appeal lies against an order extending time for the payment of mortgage money, but only where there is an order refusing such extension. The present appeal is based only on the ground that time was wrongly extended, and in effect it is an appeal against the order of extension. When a non-appealable order is incorporated, or results, in a decree, then S. 105 (1) aforesaid allows the order to be questioned in an appeal from the decree: *Pandhari* v. *Mahadeo* (1). As pointed out in *Laxmi Bai Naikin* v. *Ramchandra Malhar* (2), every preliminary decree in a mortgage suit leads to final decree, either of foreclosure o of redemption. In the present case (owing to a prevailing laxity of procedure), the first Court only impliedly made an order extending time. By that order it directed:

(1) that the plaintiff should receive the sum of Rs. 236-6-11 deposited in Court, in full satisiaction of his decree: but if he refused, then

(2) that the defendant Devidas should withdraw it from the Court and pay it to the plaintiff within one week, with interest at 6 per cent. per annum from 3rd November 1909 to the date of payment made. It will be seen that here there is no order:

(i) expressly extending time;

(ii) expressly dismissing the application for a final decree for foreclosure; or

(iii) expressly ordering the issue of a final decree for redemption.

I need hardly add that no formal redemption decree has ever been drawn up; and yet that alone could be the foundation for a legal appeal in this case. It goes without saying that the lower appellate Court took no notice of the above defects. Contrary to the provisions of the Civil Procedure Code, it accepted and decided an appeal against an order impliedly extending time and directing a payment in future which when made, would have been the foundation for a final decree for redemption in favour of Devidas.

Technically the present appeal is not maintainable, because there exists no

(1) [1911] 7 N. L. R. 162=12 I. C. 795.
(2) [1907] 3 N. L. R. 146.

formal decree of the first Court out of which could arise a legal first appeal on which this second appeal could be founded. But it is here that S. 99 of the said Code comes to the rescue, and allows me to treat the order of the first Court as what that Court intended and what the parties and the lower appellate Court interpreted it to be, namely a redemption decree: and I, therefore entertain this appeal and will use it for the purpose of amending the form of the first Court's orders.

I now come to the merits of the appeal.

The decisions of this Court in *Nand Lal* v. *Ram Ratan Lodhi* (3); *Seth Bagwandas* v. *Shridhar* (4) and *Laxmi Bai Naikin* v. *Ramchandra Malhar* (2), have been strongly pressed npon me, and it seems to me that those rulings have conveyed an impression that the dictum in *Govinda* v. *Gangaram* (5) has been entirely overruled. That is not the case. It must be conceded that in the first of the above cases the remark at p. 143 that "the mere fact that the money is lodged cannot by itself explain failure to pay punctually" seems to be in conflict with the dictum in *Govinda* v. *Gangaram* (5) that "where a few days after the fixed time the mortgagor pays down the whole of the mortgage money he should not forfeit his estate." But the conflict is apparent rather than real. A judgment-debtor who negligently fails to pay on or before the due date is in a very different position from one who, with the exercise of due diligence, succeeds in raising the money, but only after the due date is past. Under both the rulings in question time would not be given to the former and would be given to the latter. The later rulings merely draw attention to the law that time is not to be extended unless for sufficient cause. They do not lay down any measure or standard of sufficient cause. That is necessarily a question of fact to be decided according to the circumstances of each particular case and the discretion of the Court in dealing with the same. In *Seth Bagwandas* v. *Shridhat* (4) it was said that *Nand Lal Lodhi* v. *Ram Ratan* (3) "should go far to disperse the erroneous practice which has grown up of allowing redemption as a matter of course on payment being made at any time in the course of proceedings for an order absolute." That was the object of these later rulings, and it was not their purpose to fetter the discretion of the Courts in granting extensions of time within legal limits. The dicta of Crosthwaite, J. C., in *Govinda* v. *Gangaram* (5) that, (1) the Court may, on proper grounds being shown, enlarge the time for payment, and (2) a very strong reason is not necessary for a first enlargement, stand as good law at the present day and have been in no way modified by any later reported ruling of this Court.

It must be remembered that the primary object of a mortgage is to secure the payment of a debt usually much below the market value of the property mortgaged. It is not intended, at least by the mortgagor, and ostensibly also by the mortgagee, to work as a forfeiture of estate. Therefore a mortgagee who gets back his money, with compensation for any delay which the mortgagor could not reasonably avoid, suffers no hardship. Before a decree of Court takes the place of the contract, the right of redemption is unaffected, except as to the amount payable, by failure to pay on the due date. The deed of mortgage usually provides, expressly or impliedly, for post diem interest as compensation for delay. It is the necessity of finality and early disposal in litigation and the growth of the encumbrance beyond the capacity of the mortgaged property to sustain it which demand that the transaction shall come to an end by payment or foreclosure as soon as may be equitably possible. Therefore, though no extension of time can be granted without "good cause," those words will be liberally interpreted, with leniency towards the debtor, in the case of a first enlargement. In matters of judicial discretion the Courts in India habitually follow the practice of the English Courts of equity. This was done in *Gobinda* v. *Gangaram* (5) and *Nand Lal Lodhi* v. *Ram Ratan* (3). The following extracts from Ch. 5, S. 3, para. 1955, et seq., of Fisher's Law of Mortgage, 6th Edition, will sufficiently show the English practice:

"The enforcement of the strict terms of that part of the judgment in a foreclosure suit which directs absolute fore-

(3) [1906] 2 N. L. R. 137.
(4) [1907] 3 N. L. R. 55.
(5) [1889] 2 C. P. L. R. 29.

closure upon nonpayment of the redumption money on a certain day, is in the discretion of the Court, which may relieve against the either by a postponement of that day, or by an actual opening of the foreclosure, after the day has been suffered to pass without payment. * * * * It is only in a foreclosure action, as a general rule, and not in an action for redemption, that this indulgence is granted; because in the latter case, the mortgagor comes to the Court for the relief, professing that his money is ready; but in a foreclosure suit, he redeems by compulsion. * * * But, under special circumstances, the time for payment has been enlarged even in a suit for redemption. * * * *
* Upon good cause shown, the Court does not stop at a single enlargement in a foreclosure suit. Relief has been given three, and even four, times in succession.
* * * * But the time is not enlarged as of course even upon the first application. Some reason (though a very strong one is not necessary) must be given; as that the defendant has used his best endeavours to find an assignee without success, but that if time be granted there is a reasonable prospect of getting the money, or that negotiations for that purpose are actually pending. And the magnitude of the sum involved, and of the arrears of interest are circumstances to which weight will be given. * * * * But something more than the above excuses seems necessary upon subsequent applications; such as evidence that some steps have been actually taken, as the result of which the money is likely to be forthcoming. And a strong case of unexpected delay or difficulty must be made out to support a third or fourth application. * * * * The period granted upon the first application is usually six months, and it does not appear that any longer time has been granted at once. The like period has also been given on a subsequent application, but the period has then varied from five to three months according to the circumstances. The order commonly directs * * payment *
* * * of interest and costs.
* * * * The general condition of paymet of interest will not be relaxed by reason of the infancy of the person entitled to redeem. * * *
* * The condition for payment of interest and costs will not be imposed where the foreclosure is opened by reason of the mortgagee's own acts. * *
* * * The occasions upon which the Court will give * * *
* relief, and the terms upon which it will give it, depend upon the circumstances of each case. The expectation that the money will be ready, founded upon a treaty already commenced with a proposed assignee; * * * ignorance or mistake as to the state of the proceedings or the day fixed for payment; irregularity in the proceedings before the order absolute; the illness, or accidental inability to travel, of the person charged with payment of the money; *
* * poverty which could be shown to be but temporary; * * *
that the property has a special value for the mortgagor, may * * *
be taken into consideration."

The English cases bearing on the above statement of the law are very numerous, and it is only necessary to cite *Campbell* v. *Holyland* (6); *Novosielski* v. *Wakefield* (7); *Edwards* v. *Cunliffe* (8); *Nanny* v. *Edwards* (9); *Eyre* v. *Hanson* (10); *Quarles* v. *Knight* (11); *Campbell* v, *Moxhay* (12); *Geldard* v. *Hornby* (13); *Coombe* v. *Stewart* (14); *Buchanan* v. *Greenway* (15); *Collinson* v. *Jeffery* (16); *Joachim* v. *M'Donall* (17); *Ford* v. *Wastell* (18); *Blackburn* v. *Caine* (19); *Kingsford* v. *Poile* (20) *Cocker* v. *Bevis* (21); and *Ismood* v. *Claypool* (22).

(6) [1878] 7 Ch. D. 166=47 L. J. Ch. 145=38 L. T. 128=26 W. R. 109.
(7) 34 E. R. 161=17 Ves. 417.
(8) 56 E. R. 106=1 Madd. 287.
(9) 38 E. R. 752=4 Russ. 124=6 L. J. (o.s.) Ch. 20=28 R. R. 24.
(10) 48 E. R. 1266=2 Beav. 478=9 L. J. Ch. 302=50 R. R. 253.
(11) 8 Price 630.
(12) 18 Jur. 641.
(13) 66 E. R. 1026=1 Hare 251=6 Jur. 78=58 R. R. 60.
(14) [1847] 51 E. R. 44=13 Beav. 111.
(15) [1846] 50 E. R. 1097=12 Beav. 355=85 R. R. 117.
(16) [1896] 1 Ch. 644=65 L. J. Ch. 375=74 L. T. 78=44 W. R. 311.
(17) 59 E. R. 379=9 Sim. 314.
(18) 67 E. R. 1151=2 Ph. 591=17 L. J. Ch. 368=12 Jur. 404.
(19) [1856] 52 E. R. 1245=22 Beav. 614=111 R. R. 506.
(20) [1860] 8 W. R. 110.
(21) 22 E. R. 695=1 Ch. Cas. 61.
(22) 59 E. R. 380=9 Sim. 316n.

Nanfan v. *Perkins* (23) and *Jones* v. *Creswicke* (24).

The cases in which time has been extended upon one ground or another, whether in England or India, must not be taken as exhaustive. They are merely illustrative of an equitable practice. In every case the Court has to be satisfied, in the exercise of a reasonable discretion, that there is good cause for extending time. This good cause is not to be assumed either from nonpayment or delayed payment. Order 34, R. 3, requires that it should be shown. That is to say, it must be conveyed to the knowledge of the Court by judicial procedure. For a first enlargement the affidavit of the applicant, or of some person on his behalf, e. g., an intending assignee, should ordinarily be sufficient, unless there is a counteraffidavit, and the Court sees reason to doubt the truth of the applicant's statement, in which case evidence will be necessary. For each extension of time subsequent to the first a stronger case must be made out. The case of *Karsondas* v. *Bai Gungabai* (25) was cited on behalf of the appellant as applicable in principle. It might so apply to a case whether, after a final decree for foreclosure has been made, the judgment-debtor applies to reopen it so as to allow of redemption. But I do not think that any safe analogy can be drawn from the case of admitting a time-barred appeal for the purpose of deciding whether or not time shall be extended in a foreclosure decree. The policy of the law is diametrically opposed in the two cases. It is against a time-barred appeal and in favour of redemption of an unforeclosed mortgage.

In the present case the learned counsel for the appellant objects that the Courts below have not proceeded judicially in deciding that there was sufficient cause : that there has been no inquiry and there is no record on which the fact of good cause can be decided. To a certain extent this is a just criticism. Nevertheless, there is upon the record sufficient material to justify me in sustaining the order of the Court below with some modification. As a Judge of the High Court for Berar for the last ten years, it is within my judicial knowledge that the established practice in that territory, until very recently, was to allow redemption as a matter of right, upon payment made before an order absolute for foreclosure was actually passed. The defendant Devidas and his friends were obviously under the impression that a payment made before a final decree was passed would satisfy the decree; and, under that impression, arrangements to pay were deferred until notice was given to show cause why the decree should not be made final. No doubt this mistake will receive less consideration as time goes on and the public generally become disabused of the error created by the above procedure. But at present the application of the Transfer of Property Act and the Central Provinces view of the matter before me is still sufficiently an innovation to excuse the above mistake. The minority of Devidas during the period fixed for payment is an admitted fact, and his payment of the debt as soon as he attained majority is another circumstance to be taken into consideration in making an equitable order. I think these facts afford good cause for a first enlargement. But it must be made in a legal form. For that purpose I allow the appeal, fixing Rs. 15 as pleader's fees in this Court, and, reversing the informal decrees of the Courts below, I direct that a decree be drawn up ordering as follows :

(1) That sufficient cause having been shown time for redumption of the mortgage is extended from 3rd November 1909 to 4th April 1911, subject to the payment of simple interest on the decretal sum of Rs 236-6-11 at 6 per cent per annum for that period ;

(2) that the appellant do pay to the respondents and bear all the costs of these proceedings in the two appellate Courts and that such costs be set off against the price of redemption, but that the respondents do pay and bear the costs of the proceedings in the first Court ;

(3) that inasmuch as the costs payable by the appellant to the respondents exceed the sum payable for interest during the period of extension, and the respondent Devidas paid the full decretal sum into Court on 4th April 1911, it is hereby declared that the mortgage property has been duly redeemed and the

(23) 59 E. R. 376=9 Sim. 308.
(24) 59 E. R. 374=9 Sim. 304=9 L. J. Ch. 113 =47 R. R. 249.
(25) [1906] 30 Bom. 329=7 Bom. L. R. 965.

respondents are entitled to recover by execution any surplus due to them for costs.

In conclusion I would point out for the guidance of the Courts below that when a preliminary decree is followed by redemption, a final decree for redemption should always be drawn up. This will avoid confusion. An order extending time merely opens the way to payment, and the payment being duly made, a final decree for redemption is as necessary as is a final decree for forcelosure where payment is not made. One or the other is consequential of the terms of the preliminary decree.

P.N./R.K. *Appeal allowed.*

A. I. R. 1914 Nagpur 13

MITTRA, OFFG. A. J. C.

Umraosingh—Applicant.

v.

Suganchand—Non-applicant.

Civil Revn. Appln. No. 41-B of 1912, Decided on 29th July 1913, from order of Small Cause Court Judge, Amraoti, D/- 28th February 1912.

(a) Hindu Law—Joint family—Undivided share.

The share of an undivided brother in the ancestral family money-lending business cannot be attached in execution of a decree against him personally: 2 *B. L. R.* 91 and 14 *M. I. A.* 40, *Foll.* [P 13 C 2]

(b) Jurisdiction—Small Cause Court.

A Small Cause Court has no jurisdiction to attach a half share in a joint family property, consisting partly at least of immovable property. [P 13 C 2]

N. M. Bedarkar—for Applicant.

G. V. Deshmukh—for Non-applicant.

Judgment.—In execution of a decree for money, the Small Cause Court at Amraoti attached the judgment-debtor's half share out of "the whole estate in the shop of Khushalsingh Buddusingh." The judgment-debtor and his minor brother were members of a joint undivided Hindu family carrying on an ancestral money-lending business under the name and style above mentioned. The assets consist of money, ornaments, negotiable instruments, bonds and mortgage deeds. A prohibitory order under S. 268 was issued to the judgment-debtor and later on to his brother. In the sale proclamation, the property to be sold was described in similar terms. It was purchased by the respondent Suganchand for Rs. 18 on whose application the lower Court has passed a vesting order under O. 21, R. 81. The details of what the property was were never at any stage of the proceedings specified. The pleader for the decree-holder on 15th September 1908, stated that "the property is moveable, the judgment-debtor's interest in which he wishes to attach."

The judgment-debtor has applied for revision under the Berar Small Cause Courts Act. My attention has been drawn to many irregularities in connexion with the sale, but I need not notice them. The judgment-debtor, it would seem, was ignorant of the proceedings for sale having been revived in 1909.

It seems to me that the attachment and sale are void on the ground of uncertainty and vagueness. At any rate the Small Cause Court had no jurisdiction to attach a half share in joint family property consisting partly at least of immovable property. It is admitted that the judgment-debtor was joint with his brother at the date of attachment. His share can only be determined in a general partition and until such a partition is effected, all that can be sold is the equity to obtain a partition of the whole estate, moveable and immovable. This in my opinion, cannot be done by the Small Cause Court.

The attachment is also void on the ground of uncertainty. It is impossible to say what property will be allotted to the share of the judgment-debtor in a partition. The law does not contemplate an attachment of something which is unknown and unascertained. As Sir Barnes Peacock in *Nag Tha Yah* v. *F. N. Burn* (1) says: "An attachment must specify what is attached . . . For instance, it would not do to stick up in the zillah that the creditor attaches all the rights and interest which the debtor possesses in any property in the entire zillah."

In the case of *Syud Tuffuzzool Hossein Khan* v. *Raghoonath Pershad* (2) their Lordships of the Privy Council observe that "their Lordships feel that it would be a cruel wrong and injustice if under colour of an execution, a thing described as a claim remanded by the Lords of the Privy Council for the settlement of accounts and referred to arbitra-

(1) [1869] 2 B. L. R. 91=11 W. R. 8 (F.B.).
(2) [1870-72] 14 M. I. A. 40=7 B. L. R. 186=2 Suth. 434=2 Sar. 656=20 E. R. 701 (P.C.).

tors, could be put up to judicial sale; a thing utterly incapable of being estimated or valued, as vague and uncertain and unmeaning a description as if it had been all the claims of Ramnath against all his debtors."

I have held that the mortgage deeds or some at least would represent immovable property, which the lower Court was not competent to deal with. But even apart from this, a sale of this vague and uncertain kind can convey no title.

If each item of property had been separately attached, various forms of attachment would have to be resorted to and it is difficult to see how under one form of attachment, properties of various descriptions can be dealt with, as has been attempted in this case.

I therefore set aside the vesting order passed by the lower Court and declare the attachment and sale null and void. There has been some delay on the part of the applicant in moving this Court. He will bear his own costs in both Courts. He will also pay the costs of the auction-purchaser in both Courts. I fix the legal practitioner's fee at Rs. 15 in each Court. I note that the applicant's learned pleader has, on behalf of his client, offered to return the money deposited by the auction-purchaser and interest (damdupat) thereon.

P.N./R.K. *Order set aside.*

A. I. R. 1914 Nagpur 14

MITTRA, OFFG. A. J. C.

Dhansingh—Appellant.

v.

Ganpat—Respondent.

Second Appeal No. 190-B of 1912, Decided on 26th August 1913, from decree of Addl. Dist. Judge, East Berar, D/- 15th March 1911.

Civil P. C. (1882), S. 263—Compliance with S. 263 is interruption of judgment-debtor's adverse possession.

Where the provisions of 263, Civil P. C., 1882, are substantially complied with, transfer of posession, in the eye of the law, is complete, whether it is called symbolical possession or not, and such delivery of possession would have the effect of interrupting the judgment-debtor's adverse possession. The possession of the judgment-debtor after such delivery can only be regarded as a fresh act of tresspass giving rise to a new cause of action: 14 *I. C.* 447, *Diss. from.*

[P 14 C 2]

N. M. Bedarkar—for Appellant.

F. W. Dillon—for Respondent.

Judgment.—My learned predecessor, in admitting this appeal, allowed the appellant leave to argue at the hearing an additional ground based on the recent judgment of a Full Bench of the Bombay High Court in *Mahadeo Sakharam* v. *Janu Namji* (1). The facts of the case material for the purposes of this appeal are simple. The defendant sold a field to the plaintiff's uncle and predecessor-in-title, who brought a suit for possession and obtained a decree. On 25th May 1899, the plaintiff's uncle was put in possession of the field in execution of the decree. The officer charged with the execution of the warrant for possession went to the field and, in the presence of the judgment-debtor, delivered formal possession. No objection of any kind was then raised by the latter. The majkuri made the usual report that the order of the Court had been duly executed. A receipt showing delivery of possession was signed by the decree-holder and filed and the execution case was struck off. Notwithstanding this the defendant has managed to remain in actual possession. The suit has been filed within 12 years of the date of delivery of possession, but more than 12 years have elapsed since the date of the sale-deed. The main question I have to decide is whether the suit is barred by limitation.

In the Bombay case, strongly relied on by the appellant, it was laid down that symbolical possession is not real possession nor is it equivalent to real possession under the Civil Procedure Code, except when the Code expressly or by implication provides that it shall have that effect. Further, it was held that symbolical possession is neither prescribed nor recognized by S. 263 or S. 318 of the Code, 1882. With great respect, the real question seems to me to be whether the provisions of S. 263 were substantially complied with. If they were, the transfer of possession, in the eye of the law, was complete whether we call it symbolical possession or not, and such delivery of possession would have the effect of interrupting the judgment-debtor's adverse possession. The possession of the judgment-debtor after such delivery can only be regarded as a fresh act of trespass giving rise to a new cause of action.

(1) [1912] 36 Bom. 374=14 I. C. 447.

Now S. 263 requires the removal, if necessary, of any person bound by the decree who refuses to vacate the property. If, as in this case, the judgment-debtor being present, raises no objection, he must be taken to have tacitly agreed to or acquiesced in the delivery of the land. This, in my opinion, effects a complete transfer of possession, such as the Procedure Code contemplates. It is only when the judgment-debtor refuses to vacate, that some further proceedings are necessary and in practice the provision of S. 328 of the Code are resorted to.

In the present case there were no crops on the ground for the judgment-debtor to watch. It is also not clear that agricultural operations were in progress on 25th May. Under the circumstances it appears to me that there is no presumption in favour of a wrong-doer that he exercised any overt acts of ownership indicating an intention to exclude the decree-holder. On 25th May 1899, then, the possession of the decree-holder should be presumed to be real possession, within the meaning of the Bombay ruling, at least in the absence of any evidence to the contrary. The decree-holder had the intention and the power to exclude the judgment-debtor, so long at least as the officer was present. I am unable to see on what principle the continuance of possession on the part of the judgment-debtor should be assumed in these circumstances. The only legitimate interpretation to put on the facts of the case is to hold that there was a subsequent ouster of the decree-holder after he was put in such possession of the field as the circumstance admitted.

Where possession is delivered in the absence of the judgment-debtor, it seems to me that the principle laid down by the Full Bench in the case of *Juggobundhu Mukerjee* v. *Ram Chunder Bysack* (2) should apply: "In contemplation of law, both parties must be considered as being present at the time when the delivery is made." If this rule applies to execution under S. 264, it equally applies to one under S. 263. Delivery in such a case ought to be as effective as where the judgment-debtor is removed, when he refuses to vacate the property, seeing that there is no provision for compelling his attendance. In my opinion the delivery would, as against him, be complete and I fail to understand why his subsequent disturbance of the peace should place him in an advantageous position.

Section 328 of the old Code gives summary relief to a decree-holder, when the officer charged with execution of the warrant is resisted or obstructed by any person. This, in my opinion, is suggestive of the view that delivery is complete when formal possession is given without any disturbance on the part of the judgment-debtor, otherwise the Code would also have expressly provided for subsequent disturbances within a certain time limit.

I need not express any opinion on the difficult question as to the effect of delivery in a wrong form. There are two important judgments of the Calcutta High Court which deal with this point *Lokessur Koer* v. *Purgum Roy* (3) and *Hari Mohan Shaha* v. *Baburali* (4). Neither of these cases was cited before the learned Judges of the Bombay High Court. At p. 719 of the last cited report Banerjee, J., observed: "As the judgment-debtor was, and must be taken to have been, a party to the proceeding relating to the taking of possession, it is not open to the judgment-debtor to say that the whole proceeding should be taken as a nullity, and that the execution-purchaser should still be treated as one who has never obtained any possession at all." It seems to me that this is is an aspect of the case which received no consideration from the Bombay High Court.

Apparently the learned Bombay Judges would compel a decree-holder to resort to the provisions of S. 328 and the following sections and would not allow a separate suit to be brought on the basis of the symbolical delivery. It is possible to hold that a decree for possession is not fully executed till "real possession" is obtained thereunder, and that the summary remedy provided for by the sections above mentioned is all that is available for a decree-holder who has obtained merely formal possession. Such a view never found favour with any High Court under the Code, 1882. It seems to me that the legislature would have made this clear at least in the new

(2) [1880] 5 Cal. 584=5 C.L.R. 548=3 Shome. L. R. 68 (F.B.).

(3) [1881] 7 Cal. 418.

(4) [1897] 24 Cal. 715.

Code, if the intention was to overrule a series of Calcutta decisions and to prohibit a fresh suit after formal delivery of possession.

It further appears to be that if a fresh suit is allowed, it is because the execution of the decree is completed by such formal delivery. If that be so, it is difficult to see why such delivery will not also operate as a break in the continuity of the judgment-debtor's adverse possession.

I have therefore come to the conclusion that the suit is not barred by limitation.

The appeal fails and is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Nagpur 16

MITTRA, OFFG. A. J. C.

Hari and *others*—Plaintiffs — Appellants.

v.

Shridhar—Defendant—Respondent.

Second Appeal No. 605 of 1912, Decided on 30th July 1913, from decree of Divl. Judge, Nagpur Divn., D/- 3rd August 1912.

(a) Mortgage—Usufructuary—Covenant to appropriate profits after payment of revenue by way of annual interest—Revenue must be paid by mortgagee in spite of loss—Inquiry as to by whose negligence land lay fallow is precluded—Who should pay enhanced assessment depends on terms of contract.

Where, in a usufructuary mortgage the net profits, after payment of the land revenue, are agreed to be taken as equivalent to the annual interest, the mortgagees are bound by the terms of the contract to pay the land revenue, whether there is profit or loss. An inquiry whether the land remained fallow through their negligence or not is precluded by the very terms of the contract. Whether the mortgagees are to bear the enhancement of revenue made at a periodical resettlement is however a question of fact dependent upon the intention of the parties to the contract. [P17 C 1, 2]

(b) Transfer of Property Act (4 of 1882), S. 68 (a)—Usufructuary mortgage—Possession resumed by mortgagor—Personal covenent to pay interest revives.

In case of usufructuary mortgage, upon the mortgagee's abandonmeut of the possession and the mortgagor's taking back the same, the personal covenant to pay the debt and interest becomes operative and the mortgagee is entitled to interest from such date: 2 *M. I. A.* 487 (*P. C.*), *Foll.* [P 18 C 2]

A. C. Roy—for Appellants.

M. R. Dixit and *Nilkanthrao Udhoji*—for Respondent.

Judgment.—The plaintiffs sue on a mortgage, dated the 18th June 1886, executed by the father and uncle of the defendant. They obtained a decree for sale for the full amount claimed in the first Court. On appeal by the defendant the decretal amount has been reduced to Rs. 70-1-6. The plaintiffs have now filed a second appeal. Many of the points in controversy between the parties have been now set at rest by the findings of fact arrived at by the lower appellate Court and this second appeal turns mainly on the construction of the mortgage deed.

The parties are agreed that the latter part of the mortgage deed has been more accurately translated in the judgment of the learned Divisional Judge than in the official translation made in this Court. I shall therefore adopt the former translation where it differs from the latter.

The mortgage deed begins by reciting that the mortgagors have borrowed Rs. 500. It then runs as follows: "We will pay interest on this at 1 per cent. per mensem. We will pay the whole amount with interest in seven years, by paying Rs. 100 at the end of Vaisakh of the next year and Rs. 100 at the end of Vaisakh of each succeeding year. We have now paid you one month's interest and batta of the said amount . . . You will take interest of the whole amount each year from Rs. 100 and credit the balance towards principal. . . - If we fail to make the repayments each year as laid down above, we will pay interest on defaulted instalments at 2 per cent. per mensem from this date till satisfaction of the amount. In lieu of this amount we have mortgaged to you our malik makbuza field . . . . and put the same in your possession. The income of the field, after deducting the revenue, you are to credit against the interest every year. If on account of heavenly mishap or Government action there be any loss to the property while in your possession, we will, without any objection, punctually pay the instalments as mentioned above. If the amount remains unpaid after seven years you will manage the fields as above till satisfaction of the amount in accordance with the terms."

Both parties have in their written pleadings agreed that the clause relating to income means that there was to be

no accounting between the mortgagors and mortgagees and that the net profits are to be taken as equivalent to the annual interest.

The mortgagees entered into possession on the execution of the document and arranged for the cultivation of the land till 1305 Fasli. They then allowed it to remain fallow till 1309. The mortgagors were compelled to pay Rupees 258-13-0 revenue for the years in which the land was uncultivated. In 1310 the mortgagors apparently with the tacit consent of the mortgagees resumed possession and they have been in possession ever since.

The lower Court has debited the mortgagees with the amount of land revenue paid by the mortgagors and has disallowed interest.

The first point for determination is whether the appellants were rightly debited with the land revenue for the four years. In my opinion, they having entered into possession, were bound by the terms of the document to pay the land revenue, whether there was a profit or loss. They stipulated for not being liable to keep accounts of the usufruct. If the usufruct exceeded the interest, they were at liberty to appropriate it without any reduction of the principal. Equally they were bound to credit themselves with the interest and to pay the revenue, if there was a loss. This is not a case where it is necessary to inquire if the land remained fallow through their negligence or not. The very terms of the contract preclude all such inquiry. This ground of appeal fails.

The next point urged is that they should not be debited with the enhanced revenue which was imposed in 1893. They made no claim for the two or three years that they themselves paid the enhanced revenue after the new settlement came into force, but they object to their liability for the years in which the defendant's predecessors paid it. I think in this case it may well be assumed that the parties contemplated the usual enhancements which take place at periodical re-settlement of the land revenue. The plaintiffs might have sued for the mortgage money in 1893 but having elected to continue in possession for a few years, they cannot now complain of the enhancement of the revenue. Cases have been cited before me by both sides, but as the question depends on the intention of the parties it is unnecessary to refer to them.

The last point argued is that the appellants should have been given interest at one per cent. per mensem as provided for in the deed, for the period that they derived no income from the land. There can be no doubt that the appellants have been rightly disallowed the interest for the four years the land remained in their possession uncultivated. Under the terms of their document such a claim is untenable.

I will now proceed to discuss whether the appellants are entitled to interest from the date the defendant's father and uncle resumed possession. The reason for disallowing interest for this period is given by the learned Divisional Judge in the following sentence: "Having voluntarily and wrongfully relinquished possession of the property which they were holding in lieu of interest, I cannot see how the mortgagees can possibly be entitled to any interest whatever after the end of 1309." This would be a complete answer to the appellants' claim if the mortgage was a purely usufructuary one, or if the mortgagors themselves had not resumed possession.

There was no discussion, apparently, in the lower appellate Court, as to the nature of the mortgage. In the plaintiff's written statement, dated 1st December 1910, (para. 4), it was pleaded that "the mortgage-bond in suit is a simple mortgage usufructuary. The bond contains a personal covenant to pay interest at one per cenf. per mensem and to pay off the principal and interest by yearly instalments." The defendant did not deny this. It is difficult to see on what ground the plaintiffs have been given by both the lower Courts a decree for sale, unless the mortgage is in part a simple mortgage.

Is the mortgage, then, as argued for the respondent, a simple mortgage so far as regards the principal and a purely usufructuary one as regards the interest? The test appears to me to be this: if the plaintiffs had never taken posisssion, could they have got a decree for sale for the entire mortgage money including interest and penalty provided for in the deed? The learned counsel for the respondent did not seriously contend that

the plaintiffs could not have done this. The personal covenant clearly extends to payment of the interest and the penal rate of interest. At the date of the document the first month's interest was paid in cash. In the face of this it seems to me difficult to hold that the sole mode, provided for by the document, for the recovery of the interest, was possession of the land and its usufruct. I am therefore of opinion that if the plaintiffs had never taken possession of the land, they would have been able to secure a sale decree for the entire mortgage money. I note that this contention of respondent finds no support in the judgment of the learned Divisional Judge.

I have held that the plaintiffs had two alternative remedies for the recovery of their money. But having elected to take possession, they were not at liberty to abandon it arbitrarily and for this reason, they have been rightly debited with the land revenue and have been disallowed interest for the years 1306-1309. But I have now to consider what is the effect of the mortgagors' taking back possession in 1310. In my opinion this amounts to an acquiescence in the mortgagees' abandonment of the possession of the land and the personal covenant to pay at once became operative though not so expressly provided for in the document.

In the case of *Juggeewun Das Keeka Shah* v. *Ramdas Brijbookundas* (1), their Lordships of the Privy Council, speaking of the acquiescence of a mortgagee in the mortgagor's possession of land to which the former was entitled, observe as follows : "Now the question will be in what way the mortgagee's rights are affected by this conduct, and that will depend first upon the consruction of the instrument itself. If this is a binding contract, binding between him and the mortgagors, binding him to apply the rents and profits to the payment of the debt, he might be considered as having forfeited his right to payment in consequence of having allowed the mortgagors themselves to take possession of the rents and profits during some of the years during which his Mehta was in possession. But their Lordships are of opinion that that is not the true construction of the deed, but that it is merely a power to satisfy himself, just as an English mortgagee may, by taking possession of the rents and profits of the estate : and if an English mortgagee chooses to forgo the benefit of receiving the rents and profits and permits the mortgagor to take them, it would have no effect as between him and the mortgagor; he would have a full right to recover his debt by reason of the mortgage."

If then the mortgage were a purely usufructuary mortgage, it would have been binding on the appellants to recover their money out of the usufruct. The appellants having another remedy may fall back on it the moment the mortgagors took back possession. I can see no equity in allowing the latter to retain the land and at the same time denying the mortgagees their rights under the personal covenant.

The respondent's counsel relied on the following cases : *Partab Bahadur Singh* v. *Gajadhar Bakhsh Singh* (2), *Khuda Bakhsh* v. *Alim-un-nissa* (3) and *Jhunku Singh* v. *Chatkan Singh* (4). In the first two cases the mortgagor was not himself in possession, and in all the cases the mortgage was held to be a purely usufrutuary mortgage.

There is one grievance of the respondent which it will be just as well for me to notice here. It is said he has been put to great loss by reason of the land being allowed to remain uucultivated for so many years. The lower appellate Court recognizes the justice of the complaint but has somewhat reluctantly come to the conclusion that the evidence as to the amount of the loss is too vague and indefinite for the assessment of compensation in the accounts directed to be taken under S. 76, T. P. Act, where a mortgagee fails in his duties as prescribed by that section.

I hold then that the plaintiffs are entitled to interest at one per cent. per mensem on the mortgage money due to them in 1310.

P.N./R.K. *Appeal accepted.*

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(1) [1837-41] 2 M. I. A. 487=6 W. R. 10=1 Suth. 109=1 Sar. 222=18 E. R. 386.

(2) [1902] 24 All. 521=29 I. A. 148 (P. C.).
(3) [1905] 27 All. 313=(1904) A. W. N. 273=1 A. L. J. 715.
(4) [1909] 31 All. 325=2 I. C. 221.

A. I. R. 1914 Nagpur 19

MITTRA, OFFG. A. J. C.

Ramchandra—Defendant— Appellant.

v.

Mt. Radha—Plaintiff—Respondent.

Second Appeal No. 121-B of 1913, Decided on 27th January 1914, from decree of 2nd Addl. Dist. Judge, Amraoti, D/- 31st March 1913.

Hindu Law—Alienation—Widow in Berar—Alienation to pay more than double the principal will not be upheld.

As according to Hindu law recovery of more than double the sum lent on interest is not allowable the payment of more than double the principal is not a pious duty. Therefore, in Berar where the rule of damdupat is in force, a Hindu widow is not justified in alienating her husband's property for the payment of a sum over and above double the principal.

[P 19 C 2]

B. K. Bose and *J. C. Ghosh*—for Appellant.

F. W. Dillon—for Respondent.

Judgment.—The plaintiff is the daughter of one Ganaji, whose widow, Mt. Sarja, having remarried in 1904, the plaintiff became entitled to Ganaji's estate. On 14th September 1889 Ganaji had executed a mortgage deed in favour of the defendant for Rs. 300 carrying interest at the rate of one rupee eight annas per cent. per mensem. On 3rd January 1900 Sarja sold the mortgaged field for Rs. 926. It is not disputed that there was legal necessity for seventy rupees borrowed by Sarja herself. As to the balance of Rs. 856, this was the amount due under Ganaji's mortgage-deed. The Courts below have held that as under the rule of damdupat, which is enforced by the Courts in Berar, only rupees six hundred could have been claimed by the mortgagee, there was no necessity for repaying Rs. 856 arithmetically due under the mortgage deed. The plaintiff has been given a decree for possession of the field sold subject to the payment of Rs. 670. The defendant has filed this appeal. The main ground urged is that the widow was justified in paying the full amount due under her husband's mortgage, irrespective of the rule of damdupat. The argument is based on the analogy of a widow's power to pay a barred debt.

The following cases have been cited before me on behalf of the appellant: *Kondappa* v. *Subba* (1), *Chimnaji* v. *Dinkar* (2) and *Udai Chunder* v. *Ashutosh Das* (3). All these cases recognize that a Hindu widow may alienate property inherited from her deceased husband in order to pay his debts, even though they are barred by the law of limitation, for it is a pious duty on her part to pay such debts. She is also not bound to take advantage of the provisions of a statute, like the Dekkan Agriculturists' Relief Act, which might enable her to evade the obligations contracted by her husband: *Bhau Babaji* v. *Gopala* (4).. But these cases do not appear to me to be in point. Here we are dealing with a rule laid down by the Hindu sages themselves limiting the amount recoverable under an agreement to pay interest—not an artificial rule created by the legislature which leaves untouched the moral or religious obligation to pay the debt. What we have to find out is whether the payment of a sum over and abcve double the amount of the principal is a pious duty on the part of the debtor or his widow. No text expressly bearing on the question has been cited before me and I am therefore not prepared to take a different view from that taken by the Courts below.

In Mandlik's Translation of the Mayukha (Edn. of 1880, at p. 104), the rule of damdupat is thus explained. In the first place, there is the following quotation from Manu (Ch. 8, Sloka 151): "Interest on money received at once (not month by month, or day by day, as it ought) must never be more than double the debt (that is more than the amount of the principal paid at [one and] the same time)." "But in any one transaction where it is realized at various times, more than the highest (allowable) interest may be levied according to Vijnaneswara (Mitakshara, Ch. 2, 1 and 18, p. 2) and the other Sampradayikas." In other words recovery of more than double the principal is not allowable, according to Hindu law. It is a fair inference that the debtor commits no sin if he repays no more than what is allowed under the text of Manu. It must be remembered that the text of Brihaspati relating to the consequences of a debtor not paying his debt speaks only of the sum lent and not of interest, and much

(1) [1890] 13 Mad. 189.

(2) [1887] 11 Bom. 320.

(3) [1894] 21 Cal. 190.

(4) [1887] 11 Bom. 325.

less of interest beyond what is allowed by the text of Manu. That text of Brihaspati has been translated as follows: "He who having incurred a sum lent or the like, does not repay it to the owner, will be born hereafter in his creditor's house, a slave, a servant a woman or a quadruped." On the whole the appellant has failed to make out that the widow was justified in alienating her husband's property for payment of interest in excess of what was legally recoverable under the text of Manu in Berar.

The appeal therefore fails and is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Nagpur 20

MITTRA, OFFG. A. J. C.

Bukharam—Appellant.

v.

Ramji—Respondent.

Misc. Appeal No. 10 of 1913, Decided on 25th October 1913, against order of Dist. Judge, Wardha, D/- 29th January 1913.

(a) Civil P. C. (5 of 1908), O. 9, R. 9—Bar of suit by plaintiff under R. 9 operates only against defendants actually present.

Where there are more defendants than one and one or more of them appear, and the others do not appear, on the dismissal of the suit in default, the disability imposed by O. 9, R. 9 on the plaintiff means a disability only as against the defendant or defendants who were actually present. [P 20 C 2]

(b) Civil P. C. (1908), S. 11, O. 9, R. 8—Dismissal under R. 8 does not operate as res judicata.

The dismissal of a suit in terms of O. 9, R. 8, is not intended to operate in favour of the defendants as res judicata. [P 20 C 2]

A dismissal in default does not come within the rule of common law that a judgment recovered against one of several joint contractors, though unsatisfied, is a bar to any action against the others. [P 21 C 1]

V. R. Dixit—for Appellant.

W. V. Gharpure—for Respondent.

Judgment.—The plaintiff instituted Suit No. 13 of 1911 on two bonds executed by the four defendants and one Daulat, a minor, through his guardian. On the date fixed for hearing both the plaintiff and the defendants were absent, but the minor's guardian ad litem was however present. The Court passed an order dismissing the suit "in default." The plaintiff has filed the present suit on the same bonds against the four defendants omitting Daulat. The first Court held that the suit is barred by O. 9, R. 9, Civil P. C. The lower appellate Court has remanded the case for trial on the merits, holding that the suit would have been barred only against Daulat, if he had been made a party. Against this order of remand one of the defendants has preferred this second appeal.

A feeble attempt was made to show that the order passed under O. 9, R. 7, is a decree as shown in the marginal note to R. 9 of the same order, and operates as res judicata. This contention, even on behalf of Daulat, would be untenable. In the case of *Chand Kour* v. *Partab Singh* (1) their Lordships of the Privy Council say that "the dismissal of a suit in terms of S. 102 was plainly not intended to operate in favour of the defendant as res judicata. It imposes however when read along with S. 103, a certain disability upon the plaintiff whose suit has been dismissed. He is thereby precluded from bringing a fresh suit in respect of the same cause of action."

The next question is whether the plea in bar can be relied on by the defendants who were themselves absent. The Code does not expressly provide for a case where the plaintiff is absent and some of the defendants are absent. O. 9, R. 4 allows the plaintiff to bring a fresh suit when both parties are absent, and the suit is dismissed in default. Why should a party who was himself in default be placed in the same position as a party who was present, and on whose admission a decree might have been passed in the plaintiff's favour? In my opinion the order should be taken as passed partly under O. 9, R. 3, and partly under O. 9, R. 7, and when O. 9, R. 9, imposes a disability on the plaintiff it means a disability only as against the defendant who was actually present. The words "the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action" must be limited to a suit against the same defendant in whose favour the order was passed. I do not see why the plaintiff should be in a worse position than if he had never brought a suit against the present defendants for that appears to be the effect of O. 9, R. 4. This view is in accordance with the opinion expressed by Mitra and Caspersz, JJ., in *Doma Ram* v. *Raghu Nath Pandit* (2).

(1) [1889] 16 Cal. 98=15 I. A. 156 (P.C.).
(2) [1906] 10 C. W. N. 40.

The appellant's counsel then argued that the liability created by the bonds was a joint liability and therefore a second suit would not lie. Though he cited no rulings, I presume he meant to rely on the Indian decisions which have followed the doctrine of *King* v. *Hoare* (3), as interpreted by the House of Lords in *Kendall* v. *Hamilton* (4). The decisions in this country as to whether the rule applies outside the Presidency towns are conflicting, but I need not express any opinion, for the rule of Common law is inapplicable to the facts of the case. The rule, as I understand, is this. A judgment recovered against one of several joint contractors, though unsatisfied, is a bar to any action against the others. The reason of the rule is, as stated in the judgment of one of the Law Lords at p. 719 of the Law Journal Report, that "the original cause of action had thereby passed in rem judicatam, and could not be the foundation of any further proceeding." Referring to *King* v. *Hoare* (3) Lord O'Hagan says: "That decision has been recognized by Courts of law in accordance with the statement of Parke, B., that "the cause of action is changed into matter of record which is of a higher nature, and the inferior remedy is merged in the higher," and that the judgment bars it, "because it is thereby reduced to a certainty, and the object of the suit attained so far as it can be at that stage." It is obvious that a dismissal in default does not come within the rule.

The appeal fails and is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

(3) [1844] 13 M. & W. 494=67 R. R. 694 = 14 L. J. Ex. 29=8 Jur. 1127=2 Dowl. & L. 382.

(4) [1879] 48 L. J. C. P. 705=4 A. C. 504=41 L. T. 418=28 W. R. 97.

* A. I. R. 1914 Nagpur 21

STANYON, A. J. C.

Balu Bai—Appellant.

v.

Tanu Bai—Respondent.

Second Appeal No. 392 of 1911, Decided on 28th February 1913, from decree of Dist. Judge, Chhindwara, D/- 5th August 1911.

*** (a) Hindu Law—Partition—Sisters—Survivorship—Sisters can by agreement effect partition to extinguish survivorship leaving reversion unaffected.**

According to the Benares School of the Mitakshara, two or more sisters may alienate by agreement amongst themselves any part of their whole interest in the joint estate inherited from their father and after such alienation no right of survivorship can be exercised by any sister or sisters in respect of the alienated property.

Hence several sisters, who have jointly inherited the estate of their father, can by express agreement among themselves, effect such a partition of their interest as to destroy their right of survivorship inter se, while leaving the reversion still unaffected. [P 25 C 2]

(b) Practice—Precedent—Judge not bound to decide on analogy of decision on similar facts.

No Judge is bound to decide an issue of fact by analogy, i. e. to follow the opinion of another Judge, upon somewhat similar pleadings and evidence in some other cases. [P 22 C 2]

M. B. Kinkhede—for Appellant.

F. W. Dillon and *J. C. Ghosh*—for Respondent.

Judgment.—The material facts may be briefly stated. One Abaji Fadnis was a Hindu governed by the Mitakshara as interpreted by the Benares School. He died many years ago possessed of an estate of moveable and immovable property, leaving a widow, Manakarnika Bai, and three daughters, namely Balu Bai, Banu Bai and Salu Bai. The widow inherited the estate, and held it to her death, after which it devolved upon the three daughters, who as usual inherited it as a single estate jointly with equal interests and with rights of survivorship inter se. In 1897 the real estate consisted of certain malikmakbuza fields at Saoner in the Nagpur District, and some absolute occupancy fields at Rangari in the Sausar Tahsil of the Chhindwara District.

In or about 1897 an arrangement took place between the three sisters, under which Balu Bai and Banu Bai took the Saoner lands and Salu Bai took the Rangari fields. Mutation of names was applied for and obtained, in order to give effect to this arrangement in respect of the malikmakbuza fields. These fields, at that time, stood recorded in the names of the three sisters, and the name of Salu Bai was now removed. There was no written agreement of partition drawn up, but the sisters were examined at the mutation proceedings and they concurred in stating that Salu Bai had given up all her rights in the Saoner fields in consideration of becoming the sole owner of the Rangari holding: see Exs. D-1 and P-1. It is an admitted fact that, from the date of this

settlement, Salu Bai had sole and exclusive enjoyment of the Rangari fields. The subsequent conduct of both parties indicates that the above arrangement was intended to be an absolute partition between Salu Bai, of the one part, and Balu Bai and Banu Bai, of the other part. On 10th January 1900, Salu Bai sold one of the Rangari fields to Rama and Kasha Kunbis (Ex. D-4); on 5th April 1900 Balu Bai sold a moiety of one of the Saoner fields to Tukaram Kunbi (Ex. D-3); and on 30th April 1900 Salu Bai sold another Rangari field to the same vendees: Ex. D-5.

This was the state of affairs when Salu Bai died in 1901. The fields still in her possession, with the rest of her estate, were then taken by her only daughter, Tanu Bai, the wife of Ramkrishna, the head master of a primary school at Kamptee. No claim was then made by Balu Bai or Banu Bai. But, later on a claim, based on their alleged right of survivorship, was evolved. On 11th November 1908, Balu Bai made a purely champertous bargain with one Harbaji Brahmin of Rangari, to the effect that he should find all the expenses of the present suit in all three Courts. If the claim succeeded, he should have one half of whatever the plaintiffs obtained: if the claim failed, he should lose his money. Thereupon, the present suit was lodged, on 23rd December 1908, upon the short ground that the settlement of 1897 was a mere family arrangement between the sisters for the convenient management and enjoyment of the joint estate, and involved no partition of their interests: and that therefore on the death of Salu Bai the Rangari fields went to her sisters by right of survivorship.

Balu Bai, who alone had made the bargain with Harbaji to maintain the suit, was originally the sole plaintiff, but Banu Bai was subsequently added. The defendants impleaded were (1) Tanu Bai, the daughter of Salu Bai, (2) Maroti, (3) Mahadeo, (4) Balia, (5) Paikia being the four sons of Rama, one of Salu Bai's vendees, now dead, (6) Ram Krishna, the husband of Salu Bai, and (7) Kasha, the other vendee of Salu Bai.

On behalf of the defendants, it was pleaded that the settlement of 1897 was a partition, under which Salu Bai gave up her whole right, title and interest in the Saoner lands, and her sisters gave up their entire interest in the Rangari fields. The first Court gave the plaintiffs a decree, but the lower appellate Court, finding the defence plea to be true and holding the partition to be valid in law and destructive of the rights of survivorship, reversed the decree of the Subordinate Judge and dismissed the suit with costs. Against this decree two appeals have been made to this Court: one the present, by Balu Bai, and the other, Second Appeal No. 482 of 1911, by Banu Bai. The separation of the plaintiffs for the purposes of appealing on common grounds against a single decree seems to be actuated by Harbaji, whose champertous bargain is with Balu Bai only and who therefore probably seeks a decree against the property in her sole name. The two appeals were heard simultaneously, and this judgment will govern the disposal of both of them.

The argument advanced on behalf of the appellants may be placed under two heads:

(1) The sisters made no partition in 1897, but merely a family arrangement for the enjoyment of a joint estate; (2) the sisters could not legally make any such partition as would destroy their rights of survivorship inter se.

As to the first of these, it seems to me that it is a question of fact, legally found by the lower appellate Court upon the direct evidence of Narayan Madho (a witness examined on commission) and on the statements, and the contemporaneous and subsequent conduct, of the sisters. This evidence forms a valid basis for the conclusion of the learned District Judge, and the finding cannot be disturbed in second appeal. It is not a matter in which any safe analogy can be drawn from findings of fact in other cases. At any rate, no Judge is bound to decide an issue of fact by analogy, i. e., to follow the opinion of some other Judge, upon somewhat similar pleadings and evidence, in some other case.

The only question, which I have to decide is, whether two or more sisters, governed by the Mitakshara, who have jointly inherited the estate of their father; can so deal with it as to destroy the rights of survivorship inter se. In my opinion that is a question which must be answered in the affirmative.

I will first examine the authorities cited before me. In *Mt. Nanhi* v. *Nathu* (1) it was laid down that, when a Hindu widow makes a gift of property inherited by her from her husband to her daughter and the daughter dies before the widow, the property gifted does not constitute daughter's stridhan, and will not descend to her heirs, but will revert to the widow. That case has no application whatever. The widow and daughter were not joint owners with rights of survivorship inter se. The widow could not by alianation convert the estate of her husband into the stridhan of her daughter. The case was decided on its own peculiar circumstances, and furnishes no authority for the present case.

The next local case quoted for the appellants was *Mt. Khulroo* v. *Mt. Saraswati* (2). That decision merely affirms the proposition that a right of survivorship exists between Hindu sisters inheriting their father's property, and that such right is not destroyed by a mere favour, conferred by one sister upon the son of another sister deceased, in the shape of allowing mutation of names to take place by substitution of his name for the name of his deceased mother. There was never any agreement of partition between the sisters. The ruling has no application.

In *Mt. Chander* v. *Murat Singh* (3) it was ruled that, in a case which is governed by the Mitakshara law, neither of two sisters who succeed to their father's property can alienate that property without the consent of the other, a proposition which is beyond dispute, but which does not assist a conclusion in this case at all events in favour of the appellants.

The case of *Gunesh Pundit* v. *Imratlal* (4) lays down that if one of two Hindu co-widows allows her right of possession on equal terms with the other to remain in abeyance during the lifetime of the latter, her right to succeed to the whole estate, on the death of the other, is not affected. This case, again, is not in point.

No doubt in each of the two cases last cited, it seems to have been assumed : (1) that Hindu co-widows could not partition so as to destroy their rights of survivorship inter se, and (2) that the joint estate of several sisters resembles, and in all respects is subject to the same limitations, as an estate held by co-widows by inheritance from their husband. But these assumptions were obiter, and with due respect they seem to be open to reconsideration. Among the published decisions of this Court, now extending over nearly half a century, there is no case which is exactly on all fours with the present case, so as to be a guide to a decision of the question at issue before me, namely, whether several sisters, who have jointly inherited the estate of their father, can by express agreement among themselves, effect such a partition of their interests as to destroy their rights of survivorship inter se while leaving the reversion still unaffected.

The first of the obiter dicta above referred to was based on an interpretation of the ruling of the Privy Council in *Bhugwandeen Doobey* v. *Myna Baee* (5). It is very necessary to understand the material facts of this case. A Hindu, governed by the Benares School of Hindu law died childless, and was succeeded by two widows, Myna Baee and Doola Baee. The latter was a minor and on her behalf a summary suit for possession was filed under Act 19 of 1841, a will having been set up. The Court trying the suit found against the will, and directed the estate to be equally divided between the two widows, the carrying out of this order being entrusted to a curator appointed under the above enactment. The property was thereupon divided; each widow was put in possession of her share and Doola Baee continued in separate possession and enjoyment of her share up to the time of her death in 1857. Under these conditions the supreme tribunal ruled :

(1) That Doola Baee's share had not beceme her stridhan ; and

(2) that the partition effected by " order of a Judge who in the particular proceedings (one under No. 19 of 1841) had no jurisdiction to determine questions of title and who could only deal with the right to possession," could not and did not operate to destroy Myna

(1) [1888] 1 C. P. L. R. 45.
(2) [1892] 5 C. P. L. R. 58.
(3) [1894] 7 C. P. L. R. 153.
(4) [1895] 8 C. P. L. R. 99.
(5) [1866-67] 11 M. I. A. 487=9 W. R. 23=2 Suth. 124=2 Sar. 327=20 E.R. 184 (P.C.).

Baee's right of survivorship over Doola Baee's share.

The ratio decidendi on this point is contained in the following words :

" It may be said, that the question here is only whether the respondent has not, by her partition lost her right of survivorship. There is however no proof of any contract to make partition, and as part of that contract to release the rights of survivorship, supposing it to have been competent to the widows to enter into such a contract. There was, as has already been shown, no jurisdiction in the Court to make a complete partition in invitam. The transaction seems to have been merely an arrangement for separate possession and enjoyment, leaving the title to each share unaffected. The acquiescence of the widows in the Judge's proceedings cannot have done more than bind each not to disturb the other's possession.'

In a further passage their Lordships said:

" For the estate of two widows, who take their husband's property by inheritance, is one estate. The right of survivorship is so strong that the survivor takes the whole property, to the exclusion even of daughters of the deceased widow. They are therefore in the strictest sense, coparceners, and between undivided coparceners there can be no alienation by one without the consent of the other."

It is manifest that this ruling does not lay down that co-widows cannot, by contract, make a partition which shall destroy the right of survivorship of each in the share allotted to the other, as seems to have been assumed at p. 100 in *Gunesh Pundit* v. *Imratlal* (4). It also seems to me that the analogy between the estate of co-widows, and that of sisters, is two widely stated in *Mt. Chander* v. *Murat Singh* (3). In the eye of the Hindu law, two or more co-widows constitute una persona; they have a joint relationship to their deceased husband, and a joint responsibility in respect of his obsequies, on the right to perform which their ownership of his property so largely depends. This fiction of unity cannot by analogy be applied to the several daughters of one man, each of whom is regarded as a single person complete in herself. Therefore, even if the entity of co-widowhood could not be destroyed by partition so as to extinguish the right of survivorship, it does not follow that several joint sisters who have inherited their father's estate would be equally inseparable. They are distinct individuals, holding a joint estate, and in the absence of any express prohibition by the Hindu law—and there is no such prohibition - there does not seem to be any reason why they should not make a partition as effectual and complete inter se as if they were brothers.

However as the authorities now stand, it seems that even co-widows may, by agreement between themselves, convert their joint estate in property inherited from their common husband into estates in severalty so as to destroy the right of survivorship inter se. The cases of *Perammal* v. *Venkatamal* (6), *Ridnamma*, v. *Venktaramappa* (7) and *Jijoyiamba Bayi* v. *Kamakshi Bayi* (8) merely follow the proposition that no partition can be made against the wish of any one co-widow. This was affirmed by the supreme tribunal in *Gajapathi Nilamani* v. *Gajapathi Radhamani* (9); but here again the right of co-widows to make, by agreement, a partition, in the ordinary sense of that term was left undecided.

In *Sundar* v. *Parbati* (10) a Board of the supreme tribunal, which included such authorities on Indian law as Sir Barnes Peacock and Sir Richard Couch, laid down that the estate held by two widows of a Brahmin, who had died childless, being a joint estate was partible; and that either widow might maintain a suit for partition. The case was one governed by the Benares School of the Mitakshara, and one widow had sued to have the estate divided into equal shares. Here again however it is possible to argue that the decision does not touch the question of survivorship, and that there may be an enforced partition at the instance of one co-widow of an estate of inheritance jointly held by two or more of them as such, whereby severalty in enjoyment is secured with-

(6) [1862-63] 1 M. H. C. R. 223.
(7) [1866-67] 3 M. H. C. R. 268.
(8) [1866-67] 3 M. H. C. R. 424.
(9) [1876-78] 1 Mad. 290=4 I. A. 212=1 C. L. R. 97 = 3 Sar. 753 = 3 Suth. 365 (P. C.).
(10) [1890] 12 All. 51=16 I. A. 186=5 Sar. 448 (P. C.).

out impairing the right of survivorship existing between them. The effect of an enforced partition upon that right is not a point which arises in the present case, and I do not decide it. The question here is as to whether the right can be destroyed by a consensual compact between all the co-widows concerned.

There is no need to cite any authority for the well-established proposition that every Hindu widow is free to alienate her own interest in property inherited by her from her husband. Restrictions only exist against her alienation of the reversion following upon her death. There seems to be no reason to differentiate in this respect between one widow and several widows acting as one. If all of several widows agree to alienate the widow's estate in any specified portion of their inheritance, the alienation is clearly valid and binding upon them. It is intelligible that one such widow could not alienate independently of the others because, as I have said, in the eye of the law, all the co-widows constitute one person holding a single estate, which ordinarily enures till the last of them is dead. In such a case the alienation would be one, not by the widow as a whole, but a "part-widow," if I may use that expression. But where all agree, as in a consensual partition, that specific parts of the widow's estate shall be alienated to a particular individual—whether one of the co-widows or a stranger—for her or his exclusive use and benefit, then, it seems to me, that no member of the alienating body can subsequently undo such alienation on the death of the alienee. I am sustained in this view by the decision in *Ramakkal* v. *Ramasami Naicken* (11), where it was held (Subramania Ayyar and Boddam, JJ.) that "there is no legal obstacle to prevent one of two co-widows by apt words in a deed from so far releasing her right of survivorship as to preclude her from recovering from an alienee, after the other co-widow's death, property given by way of partition to the latter and alienated by her." I am not prepared to say, for reasons already given, that one of two co-widows may alienate the whole of her undivided interest independently of the other ; nor does the case last cited go as far as that. As at present advised I am clear that the right of survivorship existent between Hindu co-widows, over property inherited from their husband, cannot be destroyed by any one of them, in respect of any part of such property, without the consent of the other or all the others as the case may be. But, where all agree to alienate the whole widow's interest, either to one of them, or to a stranger, in respect of all, or any part of, such property, then no widow, so alienating, can afterwards set up the right of survivorship so as to affect the alienation.

This being the law as to co-widows holding an estate of inheritance from their common husband, it applies with greater force to the case of joint sisters who have succeeded to the estate of their father. The case of *Kanni Ammal* v. *Ammakannu Ammal* (12) lays down that one of two joint sisters cannot, of her own authority, alienate her undivided interest so as to affect the right of survivorship. That is a view which is open to some controversy, because it seems to me, with due respect, to draw too close an analogy between co-widows and sisters. But, it is not necessary, for the purposes of this case, to go into that controversy. It cannot, I think, be disputed, that, by agreement among all the sisters, any part of their whole interest, in the joint estate inherited from their father, may be alienated, and that, after such alienation, no right of survivorship can be exercised by any sister or sisters in respect of the alienated property.

Applying this law to the present case we find that Balu Bai, Banu Bai and Salu Bai were three sisters, jointly owning the estate of their father. They all agreed to alienate their joint estate in the Saoner lands to two of them, namely, Balu and Banu, and in the Rangari lands to one of them, namely Salu. In other words, with the consent of Balu and Banu, Salu released all her rights, including that by survivorship, over the Saoner lands ; and, with the consent of Salu, Balu and Banu made a similar release of their rights over the Rangari lands. This was a valid disposal of the joint estate by absolute partition. That partition leaves the reversioner's estate untouched ; but it cannot be undone by any one of the parties to it on the death of the other. Consequently the appeals before me cannot succeed.

(11) [1899] 22 Mad. 522=9 M. L. J. 101.

(12) [1900] 23 Mad. 504=10 M. L. J. 253.

This appeal therefore fails and is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Nagpur 26

STANYON, A. J. C.

Akola Gin Combination—Plaintiff—Appellant.

v.

Northcote Ginning Factory—Defendant—Respondent.

Second Appeal No. 163-B of 1913, Decided on 31st March 1914, from decree of Dist. Judge, Akola, D/- 15th November 1912.

(a) Companies Act (6 of 1882), S. 4 (1)—'Persons' in S. 4 (1) means individuals and not corporate bodies.

The word "persons" in S. 4, denotes individuals and does not include bodies of individuals whether corporate or not, since any such extended definition would be repugnant to the subject and context of the section. [P 29 C 1]

(b) Companies Act (6 of 1882), S. 4 (2)—Association of more than 20 firms formed for commercial gain requires registration.

An association of several firms consisting of more than 20 persons formed with the object of acquiring commercial gain is essentially within the purview of S. 4 and requires registration. [P 31 C 1]

R. N. Mudholkar--for Appellant.

Judgment.—It is necessary to state the facts of this case. On 31st December 1908, at Akola in Berar, eighteen companies or firms, carrying on dealings in cotton and possessed of ginning factories, entered into a coalition or syndicate, which they named "The Akola Gin Combination," and drew up a memorandum of agreement, which is Ex. P. 1 on the record of this case. This document is headed "Ginning Combination Agreement Season 1908-09, 1909-10 and 1910-11." The parties to this agreement are thus described in the memorandum: (1) The Akola Native Cotton Ginning, Dressing and Spinning Company, Limited; (2) the New East India Press Company, Limited; (3) the Akola Cotton Ginning and Oil Manufacturing Company; (4) the Shrikisandass Shiokisandass Ginning Factory; (5) the Gulabrai Govindram Ginning and Pressing Factory; (6) the Gulabrai Hardayal Ginning Factory; (7) the Ticomdas Tejmal Ginning Factory; (8) the Sangwidas Ramchandra Ginning Company; (9) the Khan Bahadur Chingalal Pooransing Ginning Factory; (10) the Manmar Manufacturing Company; (11) the Fakrudin Mulla Motabhai Ginning Factory; (12) the New Chingalal Trimbaklal Ginning Factory; (13) the Ayoobkarim Ginning Factory; (14) the Chingalal Trimbaklal Ginning Factory; (15) the Khatao Makanji and Company; (16) Messrs. Ralli Brothers; (17) the Northcote Ginning Factory; (18) the Guzrath Ginning, Ahmedabad.

The memorandum is a long one and it is only necessary to state the substance of it in this judgment. The object of the association was to work the ginning factories of its members jointly for the benefit of all, so as to prevent competition between them. The conditions laid down may be thus stated:

(1) Each party was to work his ginning factory at Akola from the 13th November 1908 to 30th June 1911 at a gross charge of Rs. 4-1-3 per bojha of cotton ginned, the weight of each bojha being 280 lbs., avoirdupois, and the quantity ginned being entered up in the account books of each factory.

(2) Each factory to be entitled to charge Rs. 2-5-3 per bojha as expenses of ginning and the balance of Re. 1-12-0 per bojha to be paid into the pool or general fund of the association. These rates are declared to be subject to alteration.

(3) Correct accounts of cotton ginned and money received to be kept by each party and to be open to inspection by all other parties. The weights and scales of each party, to be under similar surveillance by the others. The pool account for each month to be submitted by the 15th of the succeeding month and all payments into the pool to be made within 15 days of the issue of the pool account. Any factory in default to be subject to a fine of Rs. 5 per day in arrears, such fines also going to the pool.

"(4) Each party to furnish accounts to every other weekly, weighments of bojhas being made daily, and the aggregate weight of each week's ginning to be sent every Saturday to Messrs. Ralli Brothers. Default in this respect to be punishable with a fine of Rs. 5 for each day of delay, and every such fine to go to the pool.

(5) All bad debts, insolvency or failure of its customers to be borne by the factory concerned, such factory being liable to subscribe to the pool according to the weight of cotton actually ginned by it, and regardless of its own realization of charges for doing the work.

(6) Payments into the pool to be made monthly, collection being made by Messrs. Ralli Brothers' Agency at Akola, who are to divide and pay the same in proper shares to all the parties and who are expressly empowered to do all acts necessary for giving proper effect to this arrangment.

(7) All factories to be kept ready for work, but any one or more of the parties, on giving a fortnight's notice of such intention, to be entitled to close his or their factory, and dispense with the staff or staffs, for any period during the continuance of the agreement.

(8) Each party to be responsible for the cost of maintaining and working his own factory and to have no claim on the association for that purpose.

(9) In the event of a new ginning factory being set up, the agreement to remain in force only till reviewed by a meeting of the parties.

(10) No party, during the continuance of the agreement, to increase or reduce the number of his gins working at Akola, or to remove the same to places working in competition with Akola; but removal to places not working in competition with Akola, made with the previous consent of all parties, to be adjusted by reduction of the pool share of such party.

(11) Each party to supply to the others, if so required, details of his ginning machinery.

(12) The general fund to be divisible into 739 shares, that being the number of gins, and the shares allotted to each being as stated in the memorandum of agreement.

(13) In the event of any injury to the ginning plant of any factory causing disablement of a gin for more than 12 hours, written notice of the block to be given to all other parties within 12 hours; and repair and resumption of work to be similarly notified.

(14) If any gin should become permanently disabled, a proportionate reduction in the pool share of its owner to be made.

(15) Any damage to machinery capable of repair to be promptly repaired at the cost of its owner, and if carried out with due diligence, such owner's right to his full share of the pool not to be affected thereby; but undue delay in repairing to involve forfeiture of share.

(16) In the event of any share being forfeited under the agreement, the same to be divided pro rata among the remaining shareholders.

(17) Meetings of the association to be called and conducted as laid down. (It is not necessary to produce details).

(18) Any dispute among the parties to be referred to arbitration. (Details given.)

(19) Out of the working expenes allowance of Rs. 2-5-3 per bojha, each party to pay six pies per bojha to any charity which commends itself to him.

One R. B. Deo Rao Winayek Digambar was appointed the secretary and treasurer of this syndicate, which however was not registered under the Companies Act, 1882. Party No. 17, the Northcote Ginning Factory, failed to pay into the pool the money payable by it under the above Articles of Association, and became indebted to the combination to the extent of Rs. 10,214-2-7 for the season 1908-09, comprising the period between 13th November 1908 and 30th June 1909. Being pressed for this money, Khatao Hemraj Bhate, the proprietor of the Northcote Ginning Factory, executed a bond for the above sum in favour of R. B. Deo Rao Winayek Digambar *qua* secretary and treasurer of the combination, stipulating to pay the same as below:

		Rs.	a.	p.
On 31st May 1910	...	3,404	11	10
On 31st May 1911	...	3,404	11	10
On 31st May 1912	...	3,404	11	11
Total	...	10,214,-2-7		

This bond was executed on 27th August 1909. Default was made in payment of the first instalment, and on the 10th December 1910, the Akola Ginning Combination by its above named secretary and treasurer filed the suit out of which this appeal has arisen, adding interest at 9 per cent per annum to the original debt, and claiming Rs. 3,563-1-8 with costs and future interest. On the single ground that the plaintiff represents an association prohibited by S. 4, Companies Act 1882, the Sub-Judge of Akola dismissed the suit on 28th July 1911, and for the same reason this decision was upheld by the District Judge of West Berar on 15th November 1912. The plaintiff has therefore made this second appeal. During the pendency of the litigation the defendant Khatao

Hemraj Bhate died, and Mt. Premabai, the widow of Nathoo Dharamsey Bhate, has been substituted as his legal representative. Owing apparently to a translator's misspelling, the name of the defendant's factory has been erroneously entered as the "North Coat" (instead of Northcote) Ginning Factory. This error must be corrected by the Courts below.

The case was well argued before me on behalf of the appellant; but neither in this Court nor in the lower appellate Court was any appearance entered by or on behalf of the respondent.

The Courts below have applied to this case S. 4, Companies Act 1882, which reads as follows:

"No company, association or partnership consisting of more than ten persons shall be formed for the purpose of carrying on the business of banking, unless it is registered as a company under this Act, or is formed in pursuance of an Act of Parliament or some other Act of the Governor-General in Council, or by Royal Charter or Letters Patent; and no company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association or partnership, or by the individual member thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Act or of Letters Patent."

The Courts below have held:

(1) that the Akola Gin Combination consists of more than twenty persons;

(2) that it was formed for the purpose of carrying on a business that has for its object the acquisition of gain by its members; and

(3) that therefore it is an association prohibited by law, unless registered.

These findings are contested categorically in this appeal, it being urged (1) that each of the firms or factories forming the combination is only one person for the purposes of S. 4, Act 6 of 1882, and (2) that the acquisition of gain is not the object of the business carried on by the combination, but a mere distribution among subscribers of the money subcribed by them to a pool. It will be expedient to decide each of these questions separately.

First then as regards the meaning of the word "persons" in S. 4 aforesaid. No definition is given in the Act itself, and the learned advocate for the appellant claims therefore to apply S. 3, Cl. (39), General Clauses Act 1897, which reads thus:

"3. In this Act, and in all Acts of the Governor-General in Council and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context:

(39) 'person' shall include any company or association or body of individuals, whether incorporated or not."

This provision of law undoubtedly applies to assist interpretation of the word "persons" in S. 4, Act 6 of 1882. Therefore unless there is anything repugnant in the subject or context, the word will include companies or associations of individuals, and any number not exceeding twenty of such companies or associations may form a combination without registration under the Act to carry on any business other than banking.

But I am very clearly of opinion that both in the subject of the Companies Act, 1882, and in the context of S. 4 thereof, there is something repugnant to the interpretation of the word "person" as meaning anything more than a single human being. The subject of the Act is the making of legal provisions for the conduct of companies, associations, or partnerships, formed of individuals, and the Act of 1882 at least did not contemplate the association of several companies into one corporate body. I do not lose sight of the fact that in the recently enacted companies Act, 1913, which became law on 27th March 1913, a further step has been taken. In the definition of "private company" given in S. 2, Cl. (13) of this enactment we read:

"Provided that, where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this definition, be considered as a single member."

But it seems to me that this only strengthens my view that the legislature used the word "persons" to represent individuals and not bodies of individuals. A single member is expressly made to include joint persons in one particular case, but persons remain individuals even in the new Act.

Then let us look at the context of S. 4, Act 6 of 1882. The members thereof are expressly referred to as individuals in the words "the acquisition of gain by the company, association or partnership, or by the individual members thereof." The section does not contemplate any members who are not individuals: and of the meaning of individual there can be no doubt. Even in the definition of "person" in the General Clauses Act, relied on by the appellant, the word "individuals" is used to denote single human beings.

It would defeat the object of the legislature in enacting S. 4 aforesaid if the word "persons" was interpreted to include corporations; because it is obvious that an indefinite number of individuals might associate for banking or other mercantile business without registration, by the simple device of previously forming themselves into "bodies," whether incorporated or not.

I hold therefore that the word "persons" in S. 4, Act 6 of 1882, denotes individuals, and does not include bodies of individuals whether corporate or not, since any such extended definition would be repugnant to the subject and context of the section.

Next, I have to decide whether this combination was one which worked for gain. I am of opinion that this question also must be answered in the affirmative. Several authorities, both English and Indian, have been quoted in connexion with this question, and I proceed to consider them.

In *In re London Marine Insurance Association* (1), it was held that a mutual assurance society, the object whereof was not to make profits, but solely to indemnify against losses from the risks insured against, must be taken to be a valid association, though unregistered, inasmuch as a winding-up order had been passed beyond which the Court could not go. This case is clearly not in point. In *Ex parte Day, In re Day* (2), a species of mutual benefit society, the members of which made small weekly payments, which when they amounted to a certain fixed sum were called a share, the funds of the society being lent out at interest to the members, was held to be illegal because unregistered as a company. In *In re South Wales Atlantic Steamship Co.* (3), a company for establishing a service of steamers, formed with more than 20 members, was held to have no legal existence for want of registration. In *Smith* v. *Anderson* (4), an association of more than 20 certificate holders in an investment trust, being unregistered under the Companies Act, was held by the Master of the Rolls to be illegal; but this decision was overruled by the Court of appeal which decided that the object of the deed of settlement was not to authorize the carrying on of a business within the meaning of S. 4, Companies Act, 1862, but to provide for the management of a trust fund; and that, supposing the deed to authorize the carrying on of a business, such business was merely subsidiary, not forming any substantial part of the object of the association; and was moreover carried on only by the trustees who were less than 20 in number. The ruling in *Sykes* v. *Beadon* (5), was disapproved, and that in *In re Arthur Average Association Ex parte Cory* (6), doubted by the Court of appeal. In *Jennings* v. *Hammond* (7), a society of more than twenty members, being unregistered as a company, was held to be illegal, the object of the society being to raise, by monthly subscriptions and payments payable by the members in respect of their shares, a fund for the purpose of making advances to members. It was also held that a promissory note given by a member to the trustee of the society, to secure a sum of money advanced to such member under the rules of the society, was invalid and no action could be maintained thereon. In *In re Padstow Total Loss and Collison Assurance Association* (8), an unregistered mutual marine insurance Association, by the rules of which it was provided that all persons who effected an insurance with the association should be members, was held illegal: and that

(1) [1869] 8 Eq. 176=20 L. T. 943=17 W. R. 784.
(2) [1876] 1 Ch. D. 699=45 L. J. B. K. 53.
(3) [1876] 2 Ch. D. 763=46 L. J. Ch. 177=35 L. T. 294.
(4) [1880] 15 Ch. D. 247=50 L. J. Ch. 39=43 L. T. 329=29 W. R. 21.
(5) [1879] 11 Ch. D. 170=48 L. J. Ch. 522=40 L. T. 243=27 W. R. 464.
(6) [1879] 10 Ch. 542=44 L. J. Ch. 569=32 L. T. 713=23 W. R. 939.
(7) [1882] 9 Q. B. D. 255=51 L. J. Q. B. 493=31 W. R. 40.
(8) [1882] 20 Ch. D. 137 = 51 L. J. Ch. 344=45 L. T. 774=30 W. R. 326.

decision was approved in *Shaw* v. *Benson* (9), in which the Court of appeal held that a loan society consisting of more than twenty members, the objects of which were to form a fund from which money might be advanced to enable share-holders to build or purchase a dwelling house or other buildings or to lend money to each other on approved personal security, was an association having for its object the acquisition of gain. and illegal unless registered. In *In re Thomas Ex parte Poppleton* (10), an unregistered money club of more than twenty members was held to be nonetheless illegal because its business was carried on by a committee of seven members as agents of the society. *Crowther* v. *Thorley* (11) was distinguished. In *In re Siddall* (12) it was held, following *Crowther* v. *Thorley* (11) and *Wigfield* v. *Potter* (13), that an unregistered association of more than twenty persons formed for the object of purchasing a freehold estate and reselling it in allotments to members of the Association was not made illegal by the Companies Act, 1862, S. 4. In *In re Ilracombe Permanent Mutual Benefit Building Society* (14), a building society which comprised more than twenty members and was never incorporated, was held to require registration under the Companies Act, 1862.

I next examine the Indian authorities, the language of the law in England and India being substantially the same. In *Kraal* v. *Whymper* (15), it was decided that the subscribers to a general family Pension Fund are not a company, and the business of investing that fund and applying it in the payment of pensions was held not to be a business for the acquisition of gain within the meaning of S. 4, Companies Act. But in *Ramasami* v. *Nagendrayyan* (16), where more than twenty persons subscribed a fund from which loans were made to individual members, the association was held to be illegal for want of registration as a company. A similar view was taken by the same High Court in *Madras Hindu Mutual Benefit Permanent Fund* v. *Ragava Chetti* (17), the object of the association being to lend money to members. In *Panchena* v. *Gadinhare* (18) the ticket holders in a lottery were held not to be an association governed by the Companies Act. In *Neelamega Sastri* v. *Appiah Sastri* (19), where a chit fund was organized by two persons but subscribed to by more than twenty, who however entered into no contract with each other, it was held that there was no application of the Companies Act. In *Bipul Chandra* v. *Haji Nasib Ali* (20), a partnership of more than twenty persons with the single license of an elephant-catching business, such partners having no voice in the management of the business and no liability inter se but merely being subsharers in the profits gained by the licensee, were held not to be a company requiring registration.

It seems clear from the language of S. 4, Companies Act (6 of 1882)—and the remark equally applies to the present Act—and from the authorities cited, that to constitute an association within the meaning of that section there must be :

(1) A legal relation between more than twenty persons, giving rise to joint rights or obligations or mutual rights and duties ; and

(2) the object of the association must be to carry on business for the acquisition of gain for the benefit of the association as a whole, or of individual members thereof.

In the present case I have already held that the association comprised more than twenty persons, and the Articles drawn up by them make it plain that their contract gave them joint rights and obligations as well as mutual rights and duties. Then, what was the object of the Association ? It was clearly to promote the business and enlarge the profits of ginning by stifling competition, and thereby securing a fixed rate—fixed by the syndicate according to its own views—which all persons seeking to have

(9) [1883] 11 Q. B. D. 563=52 L. J. Q. B. 575.
(10) [1885] 14 Q. B. D. 379=54 L. J. Q. B. 336 =51 L. T. 602=33 W. R. 583.
(11) [1884] 32 W. R. 330 = 50 L. T. 43 = 48 J. P. 292.
(12) [1885] 29 Ch. D. 1 = 54 L. J. Ch. 682=52 L. T. 114=33 W. R. 509.
(13) [1882] 45 L. T. (n. s.) 612=46 J. P. 485.
(14) [1901] 1 Ch. 102=70 L. J. Ch. 66=84 L. T. 146=17 T. L. R. 44.
(15) [1890] 17 Cal. 786.
(16) [1896] 19 Mad. 31=5 M. L. J. 237.
(17) [1896] 19 Mad. 200.
(18) [1897] 20 Mad. 68=7 M. L. J. 26.
(19) [1906] 29 Mad. 477 = 16 M. L. J. 385 = 1 M. L. T. 237.
(20) [1909] 1 I. C. 655.

their cotton ginned in Akola would have to pay. The association aimed at getting a monopoly of all the ginning business in Akola : and by a special clause the appearance of a competitor outside the "ring" was to be the immediate cause of a reconsideration of the position. The whole transaction represents a ring formed for commercial gain—a gain in which every member was to participate, and which was secured by associating so as to eliminate competition in the rates of ginning. It does not seem to me to be open to serious argument that such an association is essentially within the purview of S. 4, Companies Act. I hold accordingly.

That being so no suit can be maintained on a bond given by one of the members to the secretary of the association, and the suit has been rightly dismissed. This appeal therefore fails and is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Nagpur 31

MITTRA, OFFG. A. J. C.

Nagorao—Appellant.

v.

Nago—Respondent.

Second Appeal No. 219-B of 1912, Decided on 6th November 1913, from decree of Addl. District Judge, East Behar, D/- 2nd February 1912.

Civil P. C. (5 of 1908), O. 1, R. 9—Suit by Hindu on mortgage in father's name without impleading other brothers on ground of partition—Suit held liable to be dismissed not for nonjoinder but because rights of parties could not be decided.

A Hindu governed by the Mitakshara law without joining his brothers and on the last day of limitation, sued on two mortgages standing in the name of his deceased father on the allegation that there was a partition between the plaintiff and his three brothers, at which the two deeds fell to his share.

Held : that the suit failed not on the ground of mere nonjoinder but on the ground that the rights and interests of the parties actually before the Court could not be decided.

The change made in the new Code does not affect the rule regarding the indivisibility of a mortgage nor the rule under the Mitakshara that no coparcener has a definite share till a partition is made. [P 31 C 2]

F. W. Dillon—for Appellant.

G. V. Deshmukh—for Respondent.

Judgment. — The plaintiff-appellant sued on two mortgages standing in the name of his deceased father on the allegation that there was a partition between the plaintiff and his three brothers, at which the two deeds fell to his share. This was denied by the contesting defendants. I may mention that the suit was filed on the last day of limitation and no application was made by either party to bring the plaintiff's brothers on the record. Issue 1 framed was : Has the plaintiff alone a right to bring this suit ? Both the Courts below dismissed the suit on the preliminary ground that the plaintiff has failed to show his right to sue alone on the two mortgages.

The first point urged in this second appeal is that the course adopted by the lower Courts is prohibited by O. 1, R. 9. That order runs thus : "No suit shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it." Upon the plaintiff's allegation there is no nonjoinder of parties. The plaintiff does not claim to sue in a representative character, as managing member of a joint Hindu family. If as the Courts below have found that the plaintiff's brothers are comortgagees with him, the rights and interests of the parties actually before the Courts cannot be determined. In the first place, a mortgage is one and indivisible and the plaintiff admittedly cannot claim a decree in respect of his share. In the second place, the plaintiff's share can only be determined in a suit for partition. In this case the suit fails not on the ground of mere nonjoinder but on the ground that "the rights and interests of the parties actually before the Court" cannot be decided in such a case. The change made in the new Code does not affect the rule regarding the indivisibility of a mortgage nor the rule under the Mitakshara that no coparcener has a definite share till a partition is made.

In the next place it is urged that under O. 1, R. 10, the Courts below should have made the plaintiff's brothers parties. But no such application was made to the lower Courts. Moreover, this is not a case of bona fide mistake on the part of the plaintiff. His case is either true or false. The partition alleged is a very recent partition to which the plaintiff himself is said to be a party. The suit moreover was filed on the very last day allowed by the law and the joinder of new plaintiffs would have been too

late, and it is difficult to see what would have been gained by joining the plaintiff's brothers as defendants when the right to sue is a joint right, and there is nothing to show that they refused to join as plaintiffs. However, it is too late now to ask for their joinder.

Turning now to the merits of the case, I hold that there is no proper finding by the lower appellate Court on the points necessary to be determined. Neither of the Courts below have found whether there was a partition between the plaintiff and his brothers. The lower appellate Court says in para. 6 of his judgment : "even conceding that the plaintiff and his brothers had separated, it has to be proved that the deeds in suit had fallen to the share of the plaintiff." But the District Judge has failed to draw the legitimate presumption arising from the fact that the plaintiff is in possession of the original mortgage-deeds, after the partition assumed for the sake of argument. The lower appellate Court must now decide whether there was a partition between the brothers and then find whether the deeds were alloted to the plaintiff's share, having regard to the evidence and the presumptions arising in the case. The decree of the lower appellate Court is reversed and the appeal is remanded to that Court for a fresh decision with reference to the above remarks. The appellant will get a certificate for refund of court-fees. Other costs will follow the result.

P. N./R.K. *Case remanded.*

A. I. R. 1914 Nagpur 32

STANYON, A. J. C.

Khemchand—Plaintiff—Appellant.

v.

Malloo—Defendant—Respondent.

Second Appeal No. 477 of 1911, Decided on 31st August 1912, from decree of Dist. Judge, Hoshangabad, D/- 9th August 1911.

(a) Transfer of Property Act (4 of 1882), Ss. 100 and 59—Attestation of deed creating charge can be made on acknowledgment by executant.

The execution of a deed creating a charge can be duly proved by the witnesses who signed it upon the executant's personal acknowledgment of his signature thereon, but such a witnessing is not the attestation of a mortgage deed within the meaning of S. 59, T. P. Act. [P 33 C 2]

(b) Transfer of Property Act (4 of 1882), Ss. 58 and 100—Distinction between charge and mortgage is that in latter way of disposal of property on default is decided—Distinction between simple mortgage and charge with respect to right to sell security pointed out.

The distinction between a simple mortgage and a charge lies in the fact that the mortgage imports, while the charge does not import, an agreement, express or implied, governing the disposal of the property in some way on default being made in payment of the debt. [P 34 C 1]

Where a person enters into a transaction involving a particular statutory obligation the presumption is that he has impliedly agreed to submit to that obligation. [P 35 C 1]

The statutory obligation of the debtor under a simple mortgage is exactly the same as it is under a charge, namely, an obligation, in default of payment, to have the security sold and the proceeds applied in payment of the debt. The debtor in each case must be presumed to know of his liability as an element of the transaction he enters upon, whether it be a simple mortgage or a charge. But it is necessary to distinguish between an implied agreement to sell and a mere tacit acceptance of a contingent statutory liability to the sale of a security, inasmuch as a statutory obligation to have a security sold in a certain eventuality is not the same thing as a transfer of a right to sell that security on the happening of that eventuality. The form of realizing the debt from the security, namely, by sale thereof, is necessarily the same, but where there is no transfer by agreement of the right to sell, that right does not come into existence at the time of the contract. In other words, in the case of a simple mortgage the right to sell the security on default of payment of the debt is created when the mortgage is effected, while in the case of a charge the statutory right and obligation to have the security sold arises only when default in payment of the debt is made and, not till then. [P 35 C 1, 2]

(c) Transfer of Property Act (4 of 1882), Ss. 58 and 100—Distinction between charge and simple mortgage — Simple mortgage rendered invalid for proper attestation does not create charge — Document creating charge though belived to be mortgage remains unaffected for want of proper attestation.

Where a document is in terms a deed of mortgage but has not been completed by proper attestation or other formality prescribed by law as indispensable for a valid mortgage, the instrument cannot be used to establish a charge. But where an instrument embodies the true contract between the parties, and is in terms an instrument which only creates a charge, then an erroneous belief of the parties that they have created a simple mortgage, and their conduct in calling it a mortgage and having it attested in that belief, would not affect the true nature and validity of the transaction. In such a case the failure to effect an attestation in the form required for a mortgage would not obstruct the legal enforcement of the charge. [P 36 C 2]

(d) Deed—Construction—Charge and mortgage—Word "gahn" does not determine whether deed is mortgage or charge—Words and phrases.

As in vernacular the word "gahn" is used to denote every form of transaction in which im-

movable property is bound as security for the payment of a debt; the name given to a document by the parties is not a sufficient guide as to whether the document creates a mortgage or a charge. [P 35 C 1]

G. L. Subhedar—for Appellant.

Bipin Krishna Bose—for Respondent.

Judgment.—This case raises the difficulty of distinguishing between a simple mortgage in which there is no express agreement of the mortgagee's right to sell, and a charge as defined in S. 100, T. P. Act, 1882. This difficulty is enhanced by the circumstance that the difference between a mortgage and a charge, adopted by the Indian legislature from English law, is so little known to the people that no word can be found in the vernacular to signify this technical use of the word "charge." Every transaction whereby immovable property is made security for the payment of money is called by the common name of "gahn." It is customary in our Courts, and generally, to translate this word as "mortgage," but there is no other vernacular word which is in use, or which would be likely to be used, to denote a charge under S. 100 aforesaid created by agreement of parties.

The document, upon which the present suit is based, is signed by two witnesses whose signatures have been proved. But it has also been proved that these persons did not see Tika touch the pen of the scribe in token of the mark appended thereto being his signature of execution, but merely witnessed his subsequent acknowledgment of execution. In *Pandurang* v. *Balaji* (1) it was held by this Court that such a witnessing did not amount to the attestation required by S. 52, T. P. Act, 1882. The facts being now beyond dispute, the only questions before me are:

(1) Was the attestation as made, valid for the purposes of S. 59, T. P. Act, 1882?

(2) Is the security created by the deed in suit, one by way of simple mortgage, as defined in S. 58 (b), or a charge as defined in S. 100 of the said enactment?

(3) If the parties intended to effect a simple mortgage, can the transaction be treated as a charge upon the plaintiff's failure to establish its validity as a mortgage?

(1) [1901] 14 C. P. L. R. 142.

1914 N/5 & 6

With regard to the first of these questions: The case of *Pandurang* v. *Balaji* (1) has been the accepted law in these Provinces since 1901, and it was expressly affirmed by this Court in *Jhama* v. *Deobux* (2) after considering the conflict of opinions in other High Courts. Under such circumstances I must decline to disturb that law, and I accordingly hold with the lower appellate Court that the attestation in this case was not such as is required by S. 59, T. P. Act, 1882. Therefore, if the deed does not create a charge expressly by its terms, or as a result of the failure of attestation in an intended mortgage, then this appeal must fail.

I now come to the more difficult question, whether the transaction embodied in the deed in suit is a simple mortgage or a charge.

In my remanding judgment abovementioned I wrote as follows:

"The lower appellate Court has yet to come to a legal finding on the question whether or not there was a valid attestation of the deed which purports to be, and, if duly completed and registered undoubtedly is an instrument of simple mortgage."

This observation was more or less obiter, and, in any case, upon a fuller consideration of the matter than was given or was necessary for the purposes of my remand order, I am of opinion that it was incorrect.

In S. 58 (b), Act 4 of 1882, we have the following definition;

"Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage money the transaction is called a simple mortgage." So much of S. 100 of the same enactment as is now relevant runs thus:

"Where immovable property of one person is by act of parties * * * * made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter

(2) [1906] 2 N. L. R. 10.

person is said to have a charge on the property."

In the Commentaries on the Transfer of Property Act, by Messrs. Shephard and Brown, Edn. 7 at p. 369, and the Law of Transfer in British India by Dr. Gour, Edn. 3, at p. 1031, this distinction between a mortgage and a charge is stated to lie in the fact that a mortgage imports, and a charge does not import, the transfer of an interest in immovable property and support for this view is claimed to exist in some of the decided cases in England and India. But with due respect, I am doubtful if the words as to the transfer of an interest have any distinctive significance in connexion with mortgages. Where a charge is created by agreement between the parties it would be difficult to understand that there was no transfer of any interest in the property bound as security. It seems to me that the answer to the question mortgage or charge turns in India upon whether there is, or is not an agreement, express or implied, governing the disposal of the property in some way which comes into existence on default being made in payment of the mortgage money. In every form of transfer there is a transfer of all or part of the transferor's interest in the property transferred. I have no doubt that the definition is worded as we read it in S. 58 so as to distinguish it from the nature and effect of a mortgage under English law. But in order to be a mortgage, the transaction must in terms satisfy the requirements of S. 58, T. P. Act. That is to say, that it must govern the disposal of the mortgaged property in one of the several ways described in that section. If it is not either a simple mortgage, a mortgage by conditional sale, a usufructuary mortgage, an English mortgage, or a combination of two or more of these forms, then it is not a mortgage at all. The distinctive characteristics of a simple mortgage are:

(1) Nondelivery of possession of the mortgaged property; and

(2) an agreement, express or implied, that, in default of due payment, the mortgagee may sell the mortgaged property and apply the proceeds in payment.

In his said work at p. 1034, Dr. Gour has written: "Of all charges, those created by the act of parties are most liable to be mistaken for simple mortgages." And the learned author goes on to say that though it is evident that the legislature intended to discriminate between the two classes of securities in giving effect to this intention' the Courts have often made a distinction without a difference. He however concedes that in India it is sometimes difficult to define "when a mortgage ends and a charge begins." This is not quite consistent however with the remark at p. 1031 that S. 100 "now draws a clear distinction between a "mortgage" and a "charge." In *Gobinda Chandra Pal* v. *Dwarka Nath Pal* (3) (the judgment in which can be recognized as the handiwork of that well-known legal author, Caspersz, J.), the following passage occurs at p. 843:

"The distinction between a mortgage and a charge is keenly appreciated by an English lawyer, though the inclusion of simple mortgages in the definitions given in S. 58, T. P. Act, has somewhat obliterated the distinction in India. The result has been a divergence of opinion between the High Courts: *Khemji Bhagwandas Gujar* v. *Rama* (4), *Motiram* v. *Vital* (5), *Rangasami* v. *Muthukumarappa* (6), *Nabin Chand Naskar* v. *Raj Coomar Sarkar* (7), *Pran Nath Sarkar* v. *Jadu Nath Saha* (8) and *Kishan Lal* v. *Ganga Ram* (9). A charge, which owes its existence to the operation of law, may be easily discovered, such as a rent-charge. A charge created for payment of a legacy or annuity or maintenance money by a will or trust deed is not difficult to distinguish from a mortgage, but the difficulty that arises in cases of liens created by other acts of parties, specially for payment of debts, must be solved in each case from the terms and expressions used in the instruments creating them and the formalities actually observed in execution. If an instrument is expressly stated to be a mortgage, and gives the power of realization of the mortgage money by sale of the mortgaged premises, it should be held to be a mortgage. The fact that

(3) [1908] 35 Cal. 837=12 C. W. N. 849=7 C. L. J. 492.
(4) [1886] 10 Bom. 519.
(5) [1889] 13 Bom. 90.
(6) [1887] 10 Mad. 509.
(7) [1905] 9 C. W. N. 1001.
(8) [1905] 32 Cal. 729=9 C. W. N. 697.
(9) [1891] 13 All. 28=(1890) A. W. N. 216.

the necessary formalities of due execution were wanting would not convert the mortgage into a charge. If, on the other hand, the instrument is not on the face of it a mortgage, but simply creates a lien, or directs the realization of money from a particular property, without reference to sale, it creates a charge. *Tancred* v. *Delagoa Bay and East Africa Railway Company* (10)."

These remarks appear to me to be a correct statement of the law, subject to this: that the name given to the transaction will not be a sufficient guide where the document is written in a vernacular language which makes a customary use of the single word "gahn" to denote every from of transaction in which immovable property is bound as security for the payment of a debt.

The distinguishing characteristics of a simple mortgage seem to be those already stated, namely the nondelivery of possession and the agreement to sell. Where the agreement to sell is expressly stated there is no difficulty. The definition however extends to the case of an implied agreement; and this is unfortunate for the cause of clearness, because where a person enters into a transaction involving a particular statutory obligation it is an easy presumption that he has impliedly agreed to submit thereto. Now the statutory obligation of the debtor under a simple mortgage is exactly the same as it is under a charge, namely, an obligation in default of payment to have the security sold and the proceeds applied in payment of the debt. The debtor in each case must be presumed to know of this liability as an element of the transaction he enters upon, whether it be a simple mortgage or a charge. If the mere fact that he possesses this knowledge when he makes his contract is to justify the conclusion that he impliedly agrees to the sale of the security, then every charge for the purpose of securing a debt is also a simple mortgage, and there can be no transaction between a debtor and creditor of the kind dealt with by S. 100, T. P. Act. I do not think that this can have been the intention of the legislature and therefore I am of opinion that it is necessary to distinguish between an implied agreement to sell and a mere tacit acceptance of a contingent statutory liability to a sale of the security. That is to say, that the terms of the agreement between the parties must contain words which point with certainty to the fact that the parties had the sale of the security in default of payment of the debt present before their minds, when making the contract, as a part and consequence thereof. The mere knowledge by the one of his right and by the other of his obligation created by statute will not suffice. There must be agreement, even though such agreement may be pratically superfluous.

A statutory obligation to have a security sold in a certain eventuality is not the same thing as a transfer of a right to sell that security made by a mortgagor to a mortgagee. The form of realizing the debt from the security, namely, by sale thereof, is necessarily the same; but where there is no transfer by agreement of the right to sell, that right does not come into existence at the time of the contract. A subsequent transferee of the security, though taking bona fide for valuable consideration, will be postponed to a prior mortgagee to whom a right of sale has already been transferred; but he will not be bound by any mere charge in which there is nothing but a statutory right and obligation still to arise, to have the security sold: *Kishan Lal* v. *Ganga Ram* (9).

Applying this reasoning to the present case, it is clear that the document* sued

(10) [1889] 23 Q. B. D. 239=58 L. J. Q. B. 459 =61 L. T. 229=38 W. R. 15.

* "(This) document a mortgage deed—(has been) executed in favour of Khemchand, son of Parasram, and Nandlal, son of Khemchand, Malis, residents of Sangakheda Kalan, Tahsil and District Hoshangabad, by Tika, son of Ganesh, caste Mali, resident of Sangakheda, Tahsil and District Hoshangabad, to the following effect: On accounts being made of a previous bond, and after credit given for repayments, a balance of Rs. 80 British currency has been found due. I will pay interest on this at Rs. 2 per cent. per month. For this money I mortgage my absolute occupancy field No. 60, area 1·98 (acre), rent Rs. 6, situated within patti 4 of Sangakheda, Tahsil and District Hoshangabad, and lay down in writing that the same shall stand mortgaged so long as the money is not paid off. The agreement as to repayment is that I will pay up the principal, together with the interest, on Baisakh Sudi 15th, S. 1960. If repayment is not made at the time stipulated, the interest due shall be added to the principal, and I will pay compound interest year after year until liquidation. I will take receipts for (such) payments (as) I may make. I will get no credit without a receipt. This bond executed by me is genuine. Mitti

on embodies nothing but a mere lien on the property mentioned therein. It expressly contemplates the possibility of a failure to pay. In a simple mortgage the remedy for such a default would be the grant of a power of sale, expressly, e.g., "You may sell the mortgaged property", or impliedly, e.g.: "I will pay out of my own pocket any balance which the sale proceeds of the mortgaged property may fail to satisfy." *Datto Dudheshvar* v. *Vithu* (11). But the terms in the document now before me are these:

"I mortgage my absolute occupancy field * * * * * and lay down * * * that the same shall stand mortgaged so long as the money is not paid off. * * * If repayment is not made at the time stipulated, the interest due shall be added to the principal and I will pay compound interest year after year until liquidation."

I do not think that any agreement that the creditor may sell the land can be implied from these or any words in the deed. I therefore hold that the deed in suit creates a charge, and that the execution thereof has been duly proved by the witnesses who signed that deed, upon the personal acknowledgement of his signature thereon made to them by the executant.

In this view of the matter it is not necessary to decide the third of the questions postulated by me above. Nevertheless it may be well to do so. I am of opinion that where a document is in terms a deed of mortgage, but has not been completed by proper attestation or other formality prescribed by law as indispensable for a valid mortgage, the instrument cannot be used to establish a charge. I concur generally in the view propounded in *Pran Nath Sarkar* v. *Jadu Nath Saha* (8) and followed in *Roy Zuddi Sheikh* v. *Kali Nath Mookerjee* (12), *Samoo Patter* v. *Abdul Sammad Saheb* (13) and *Narayan* v. *Lakshmandas* (14). But where an instrument embodies the true contract between the parties, and is in terms an instrument which only creates a charge, as defined in S. 100, T. P. Act, 1882, then an erroneous belief of the parties that they had created a simple mortgage, and their conduct in calling it a mortgage and having it attested in that belief would not, in my opinion, affect the true nature and validity of the transaction. In such a case the failure to effect an attestation in the form required for a mortgage would not obstruct the legal enforcement of the charge. This view is in accordance with the principle laid down in *Hunoomanpersaud Panday* v. *Mt. Babooee Munraj Koonweree* (15). In the present case, the plaintiffs appear to have been under the impression that the deed sued on created a simple mortgage, and they claimed to enforce it as such. It so happens that the relief claimed by them, namely, the sale of the security to satisfy the debt, was correctly demanded, being also the legal relief on a charge. But as they have fought the case on erroneous lines, I do not think they should get more than their costs in the first Court.

For the above reasons I allow the appeal, and reversing the decree of the lower appellate Court, I restore the decree of the first Court. I extend the dies datus of 15th February 1913. Each party will bear his own costs as incurred in the two appellate Courts.

P.N./R.K. *Appeal allowed.*

(15) [1854-57] 6 M. I. A. 393=18 W. R. 81n.= 2 Suth. 29=1 Sar. 552=19 E. R. 147.

(Contd. from p. 35)

Aghan Sudi 11th, S. 1958, dated 22nd December 1901.

"Mark of Tika, son of Ganesh Mali, of Sangakheda (mark made by touching the pen)."

"Written by the pen of Makhulal, Mukhtear of Sangakheda Kalan, at the instance of Tika Mali."

(11) [1895] 20 Bom. 408 (F.B.).
(12) [1906] 33 Cal. 985=4 C. L. J. 219.
(13) [1908] 31 Mad. 337.
(14) [1905] 7 Bom. L. R. 934.

A. I. R. 1914 Nagpur 36

MITTRA, OFFG. A. J. C.

Ram Gulam and *others*—Defendants —Appellants.

v.

Bala Prasad—Plaintiff—Respondent.

Second Appeal No. 360 of 1912, Decided on 4th July 1913, from decree of Divisional Judge, Nerbudda Division, D/- 19th April 1912.

Deed—Construction—Mortgage with possession of malikana rights amounts to hypothecation.

Where a superior proprietor mortgages with possession his malikana rights of a village in lieu of a money-debt, and covenants not to claim the mortgaged property till satisfaction of the debt, the agreement amounts to a hypothecation of the properfy and the mortgagee is entitled to a decree for sale of his proprietary rights. [P 38 C 1]

S. Ramdas—for Appellants.
H. S. Gour—for Respondent.

Judgment.—The plaintiff-respondent filed a suit, on 21st July 1910, in the Court of the District Judge, Narsinghpur, on the basis of a mortgage-deed, dated 23rd April 1883. The relief asked for was a decree for sale of the mortgaged property, that is the superior proprietary rights in the village of Rehli. The appellants are subsequent mortgagees of the same property. Various pleas were taken in the lower Courts, which need not be noticed. On 4th September 1911—the day fixed for argument after the case had been closed—the appellants put in a petition for leave to add a supplementary ground of defence, resting solely on the construction of the mortgage-deed. The District Judge refused to grant leave at that stage of the case. The points raised have however been fully considered by the learned Divisional Judge on appeal and the memorandum of second appeal is confined to those points.

At the hearing before me the appellant's learned counsel asked permission to raise a new point not covered by the petition of appeal and not raised in either of the Courts below. The respondent's learned counsel objecting, I had to disallow additional grounds of appeal of which no notice had been given to the other side.

The points for consideration are : (1) whether upon a right construction of the mortgage-deed in suit the plaintiff is entitled to sue for sale of the mortgaged property at all; and (2) if so whether the right to such relief is limited to the recovery of the principal amount only.

The parties agree that the answer to the first question depends on whether the mortgage is a pure usufructuary mortgage or one partly in the nature of a usufractuary mortgage and partly in the nature of a simple mortgage. Both parties rely on the dictum of this Court in *Fida Ali* v. *Ismailji* (1). The learned Divisional Judge has applied this ruling and has held that there is a personal covenant to pay combined with words of hypothecation.

The official translation made for this Court has not been challenged, and it agrees substantially with that given by the learned Divisional Judge in para. 10 of his judgment.

The mortgage runs thus: "I have now borrowed from you Rs. 500 (in words five hundred) I will pay interest on it at Re. 1-4-0 per cent (sic). I agree to repay the amount in six years from Samvat 1940 to the end of Samvat 1945. In lieu of this I mortgage with possession malikana rights of the whole of Mauza Rehli . . . . . You will, therefore take Rs. 127 year by year, the amount of my munafa, from the inferior thekadar on account of yearly interest, and if there be any surplus amount, credit it towards the principal. No one will claim the mortgaged property till satisfaction of the amount."

The appellant's counsel argues that there is no personal covenant to pay or at any rate the covenant does not extend to anything beyond the principal amount of Rs. 500. I am unable to agree with this contention. The property mortgaged yielded a fixed sum of money payable by the inferior proprietor. This sum could not be raised till the next settlement of the village, and the parties knew that no new settlement could come into operation during the term of six years. The amount might be irrecoverable in years of famine, but even if the whole amount was regularly paid, the mortgage debt could not be satisfied by the usufruct. I think the contention that the mortgage debt was to be repaid out of the usufruct only and not personally at the end of six years, fails. Here I may as well dispose of the second point raised above. It is argued that the personal covenant cannot extend to the interest. I think the plain meaning of the parties is that the "amount" payable includes interest, for the clause agreeing to pay interest immediately precedes the clause containing the personal covenant. The mortgage moreover is not a mortgage in which the usufruct was to go only in lieu of interest.

I have held that there was a personal covenant to pay the mortgage-money. But the dictum of this Court which has been accepted by both parties requires something more than a mere personal covenant.

I think there are words of hypothecation in the mortgage-deed. The property mortgaged was merely a right to recover a certain sum of money from the inferior

(1) [1910] 6 N. L. R. 20=5 I. C. 701.

proprietor, the money being charged on the village in the latter's possession. No suit would lie for the possession of such rights. The mortgagees' remedy will lie in a suit for money or in a suit for sale of the superior proprietary rights. There is no means of ejecting the inferior proprietor for nonpayment of the malikana. In my opinion the mortgagor merely charged an annuity charged upon land. If then this is the true nature of the transaction, the agreement not to claim the mortgaged property till satisfaction of the debt amounts to a hypothecation of the property within the meaning of the ruling above cited.

For the above reasons I hold that the plaintiff was entitled to the usual sale decree, and his suit was within time under S. 31 of the Act 9 of 1908.

The appeal fails and is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Nagpur 38

MITTRA, OFFG. A. J. C.

Tikaram—Defendant—Appellant.

v.

Ghasiram—Plaintiff—Respondent.

Second Appeal No. 468 of 1912, Decided on 15th October 1913, from decree of District Judge, Narsinghpur, D/- 31st July 1912.

(a) Landlord and Tenant — Partition of holding effected with mutual consent — Settlement officer's order is not necessary.

A holding can be split up by a landlord and his tenants with mutual consent and without the order of a Settlement Officer. If a partition made by two persons interested in two portions of a holding is accepted by the landlord, each becomes separate holding. [P 39 C 2]

(b) C. P. Tenancy Act (9 of 1898), S. 85—Ejectment can be ordered with respect to holding of which arrears are not paid and not other holdings.

Section 85 contemplates ejectment only from the holding in respect of which an arrear is due. In other words, it is open to a tenant to pay up the arrear on one holding aud save it from forfeiture, though he be unable to pay what is due on another holding. [P 39 C 2]

(c) Transfer of Property Act, S. 115—Surrender—Mortgagee's rights are not affected.

A surrender by a tenant will not prejudice the rights of his mortgagee when the mortgage is not voidable at the instance of the landlord. [P 40 C 1]

G. P. Dick—for Appellant.

B. K. Bose—for Respondent.

Judgment.—This is a case where, if the facts are properly appreciated, there is little difficulty in applying the law.

The defendant-appellant, Tikaram, admits the allegations made by the plaintiff in the first nine paragraphs of the plaint. I propose therefore to summarize the allegations made in those paragraphs.

The plaint states that Mohanlal and Baliram were the occupancy tenants of field No. 86, area 17¾ acres, rent Rs. 26-8-0. On 3rd August 1893, that is before the coming into force of the new Tenancy Act of 1898, a 30 years' zarpeshgi lease was given to the plaintiff, of a part of the holding, namely, of 14 bighas, with rent at Rs. 21. It is now admitted before me that the plaintiff has failed to prove the landlord's consent to the transfer, though such consent was alleged in the plaint. The then malguzar went on accepting from the plaintiff Rs. 21 as rent out of the total rent for the holding, Rs. 26-8-0. When the new settlement came into force the rent of the holding was enhanced to Rs. 35. The old No. 86 was now numbered as Nos. 108/2, 133/1, 133/2. The portion mortgaged to the plaintiff came henceforth to be numbered 133/1, There was no distribution of the rent Rs. 35 by the Settlement Officer.

In para. 7 of the plaint, the plaintiff says that with the consent of the malguzar Rs. 30 was fixed as the rent for No. 133/1, the plot in the possession of the mortgagee, and the plaintiff has been paying this rent accordingly.

In para. 6 it is stated that the rent for this plot for Sambats 1964, 1965 and 1966 was duly paid by the plaintiff to Tikaram, Mt. Gomti and Mt. Radha, the malguzars of the village.

The plaint then refers to a partition of the village as the result of which plot 133/1 has fallen to the share of Mt. Radha and Mt. Gomti.

On 24th June 1909 Tikaram brought a suit for the rent of Nos. 133/1, 133/2 and 108/2 for Sambats 1964 and 1965 and after giving credit for Rs. 30 a year, claimed Rs. 5 a year and obtained a decree against the tenants, which was followed up by their ejectment from all the plots. These proceedings are alleged to be collusive though the defendant-appellant, Tikaram, denies it.

The plaintiff questions also Tikaram, the lambardar's right to sue alone after the partition for rents due prior to the partition.

The plaintiff asks for a declaration that the decree obtained against the tenants is not binding on him and prays for possession of No. 133/1.

Mt. Radha and Mt. Gomti (defendants 2 and 3), to whose share plot 133/1 has been allotted at the partition of 1909, repudiate the action of the lambardar, Tikaram. The case has been contested throughout by Tikaram alone who has no longer any interest in the plot in suit.

The first Court dismissed the suit, holding that the mortgage was without the consent of the landlord and that Tikaram, as lambardar, had authority under the Wajibularz to institute and carry on the proceedings against the tenants. On appeal the District Judge held that Tikaram had a right to carry on the ejectment proceedings. On the authority of *Jena Bapu* v. *Ram Rao* (1) the lower appellate Court found that the landlord must be deemed to have ratified the mortgage in favour of the plaintiff, though at its inception it was voidable for want of consent. The District Judge was of opinion that the plaintiff should have been called upon to pay the balance of the rent before a suit for rent against the tenant could be instituted. He has passed a decree for possession of No. 133/1 on condition that the plaintiff deposits the amount decreed in the rent suit. Defendant 1 has preferred this second appeal, but there is no appeal by the plaintiff.

The lower appellate Court's finding that the landlord has ratified the mortgage has been questioned in the first ground of appeal. It has been found by the Court below that the rent for the plot in the mortgagee's possession has been always accepted from him with full knowledge of the transfer, and that the receipts are in the mortgagee's name. I may also point out that it was at the mortgagee's request that a separate rent of Rs. 30 was fixed by the landlord for plot 133/1. The conclusion arrived at by the District Judge is fully supported by the authority of the ruling which he cites.

I am of opinion that when the landlord agreed to distribute the rent on each parcel separately, the parent holding was split up into two holdings. The mortgagee's object in making the request was to secure an independent liability for his plot unconnected with the liability of the other plots. This was an arrangement acceptable to the landlords, for at least Rs. 30 out of Rs. 35 would be punctually paid by a well-to-do money lender such as the plaintiff is. The mortgagee had a number of years yet to enjoy his plot under his mortgage and was practically in the position of vendee. If a partition, made by two persons interested in two portions of the holding is accepted by the landlord, each becomes a separate holding. The receipts filed in the case do not suggest any intention on the part of the landlord to preserve intact the joint liability of all the plots. The appellant's learned counsel has shown no authority for the proposition that without the order of a Settlement Officer no holding can be split up by the landlord and tenants with mutual consent. I hold that plot 133/1, rent Rs. 30, is a separate holding,

It is admitted that the rent for No. 133/1 was punctually paid not only for Sambats 1964 and 1965, the two years for which the suit was brought, but also for Sambat 1966. There was therefore no arrear in respect of this holding. Whether there should be a separate suit for arrear of rent in respect of each holding, as held in *Jagannath Prasad* v. *Tory* (2), I am clear that S. 85, Tenancy Act contemplates ejectment only from the holding in respect of which an arrear is due. In other words, it would be open to a tenant to pay up the arrear on one holding and save it from forfeiture though he is unable to pay what is due on another holding.

In the suit brought by Tikaram, it was open to the tenants to have pleaded that no arrear was due in respect of No. 133/1. So long however as the decree stands it is binding on them. Can this be regarded as a case of forfeiture, when no forfeiture has been incurred as a matter of fact? Their consent to the decree places that decree on no higher footing than a voluntary surrender. The case of *Ram Saran Das* v. *Ram Pergash Das* (3) seems to support this view.

I have already held that the finding of the lower appellate Court that there was a ratification of the mortgage before

(1) [1902] 15 C. P. L. R. 99.

(2) [1906] 29 All. 18 =3 A. L. J. 610 = (1906) A. W. N. 253.

(3) [1905] 32 Cal. 283.

(4) [1906] 2 N. L. R. 170.

the institution of the rent suit, is one binding on me. We have therefore to consider the effect of a surrender by a tenant on the rights of his mortgagee holding a valid mortgage. S. 115, T. P. Act. though not applicable to the case, codifies the doctrine of common law on the point. As held by Ismay, J. C., in *Bhuray* v. *Lala Vishwanath* (4), such a surrender will not prejudice a mortgagee when the mortgage is not voidable at the instance of the landlord. In such a case the tenancy has, in consideration of law, a continuance.

I need not express any opinion as to whether Tikaram alone could maintain the rent suit and the subsequent ejectment proceeding.

In my opinion, the plaintiff was entitled to an unconditional decree for possession without payment of the rent due on the other plots, but no cross-objection has been filed by the plaintiff. The appeal fails and is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Nagpur 40

HALLIFAX, OFFG. A. J. C.

Shioshankarpuri and *others*—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 56 of 1912, Decided on 15th May 1912, from order of Sub-Judge, Wardha, D/- 1st March 1912.

Criminal P. C. (5 of 1898) Ss. 4 (m) and 476—Execution is judicial proceeding within S. 476—Sanction without probability of conviction should not be granted.

The proceedings in execution are judicial proceedings within the meaning of the Criminal Procedure Code till they are finally disposed of by the Court. [P 42 C 2]

No Court should direct or sanction prosecution unless there is a reasonable probability of conviction. The opinion of the Court should be judicial opinion based on evidence and formed after a thorough inquiry into the matter. [P 43 C 1]

V. R. Pandit and *M. B. Kinkhede*—for Applicants.

P. S. Kotval—for the Crown.

V. T. Deshmukh—for Decree-holder.

Judgment.—On a warrant issued by the Court of the Subordinate Judge, Wardha, in execution proceedings in Civil Suit No. 163 of 1910 of that Court the produce of a field said to belong to the judgment-debtors was attached. The produce consisted of 30 or 32 khandi of partially threshed juari, and was left in charge of two watchmen each of whom was given a parwana or written order of appointment. This was on the 23rd December 1911. On the opening of the Courts after the Christmas vacation the two watchmen presented a written report to the Court to the following effect: "About 4 p. m. on the 27th December eighteen men of Shioshankarpuri Gosain of Nagpur came to the threshing floor. Two of them took our written orders of appointment from us on the pretext of wanting to read them and then refused to return them. They drove us out of the field and when we went to the village we were driven out of that also. At 10 p. m. on the following day, Thursday the 28th, they came again to the field with nine or ten carts and carried off the juari." This is followed by a list of nineteen names, headed "Names of the men of Shioshankarpuri," and the first name in the list is Shioshankarpuri.

The Subordinate Judge called on Shioshankarpuri alone to show cause why he should not be prosecuted, and after considering the written statement filed and the oral arguments advanced on his behalf passed an order of which the gist is as follows: "The pleas raised by Shioshankarpuri are that he resides at Nagpur and could not possibly have been present at the scene of the alleged offence and he is not aware of the occurrence and that his servants did remove a certain amount of juari from the field but they did not know that it was under attachment or that the two men there were watchmen appointed by the Court. This is an admission that his servants removed the crop while it was under attachment and it is impossible that they should not have known of it. That they did know of it is further proved by the large number of them that went to the field. They could not have gone there except under orders from him and he could not have given those orders without knowing of the attachment. The eighteen servants therefore appear to have committed offences punishable under S. 186, 188 and 204, I. P. C., and Shioshankarpuri appears to have abetted the same. Their prosecution is therefore ordered for those offences or any others which the facts proved against them may constitute."

The main ground on which the legality of this order is challenged by Shiosankar-

Vakil High C
S Nagpur 41

puri and all except two of the other persons affected by it is the contention that execution proceedings are not judicial proceedings of the kind mentioned in S. 476, Criminal P. C. S. 4 (m) of that Code does not attempt to give us an exhaustive definition of a "judicial proceeding," but is content with declaring that in addition to what are plainly and obviously judicial proceedings that term "includes any proceeding in the course of which evidence is or may be legally taken on oath." In *Queen-Empress* v. *Tulja* (1), West and Birdwood, JJ., offered a definition of a judicial proceeding as one of which the object is to determine a jural relation between two parties. That a proceeding in execution is not such a judicial proceeding as is meant by Ss. 4 (m) and 476, Criminal P. C., is based solely on the ruling of the Calcutta High Court in *Har Charan Mookerjee* v. *Emperor* (2). This ruling was followed in *Kanto Ram Das* v. *Gobardhan Das* (3), but without any discussion or examination and the learned Judges found that the result to which it led them was "to be regretted," as it was a very apparent failure of justice.

In the former case in execution proceedings a warrant for the delivery of possession was entrusted for execution to the Nazir, who went to the spot but was obstructed by the opposite party to the suit, and on his reporting the matter the Munsif held an inquiry under S. 476, Criminal P. C., and sent the accused to the Magistrate for trial under S. 186, I. P. C. The matter was heard by Harington and Pargiter, JJ. Harington, J., said: "The definition of 'judicial proceeding' includes any proceeding in which evidence is or may be legally taken on oath. Now in this case, as between the parties to the suit, evidence could not have been legally taken, because their rights had been finally determined by the Court. It is true that some third person might have claimed the land as against the execution-creditor, and that his claim might have had to be determined in a judicial proceeding in which evidence might legally be taken. But this would be a fresh judicial proceeding between fresh parties raising fresh issues, and the fact that this possibility exists does not, in my opinion affect the question whether the judicial proceeding in which the rights of the decree-holder were decided had or had not determined before possession was delivered. In my opinion S. 476, does not apply. "Judicial proceeding" means a proceeding in which judicial functions are being exercised: when the final decision is given and the order for the execution of that decision has been made, the judicial proceeding is at an end because there is no question remaining for judicial determination. The officer of the Court who executes the order to give effect to the Court's decision does not exercise a judicial but a ministerial function. In my opinion the obstruction was committed in the course of a minsterial and not a judicial proceeding, and, therefore, the offence does not fall within S. 476."

The opinion of the learned Judge clearly was that one judicial proceeding ended with the making of the order for the issue of a warrant. Another might commence with the filing of an objection by a third party, but the intermediate proceedings were ministerial and not judicial. I feel bound to say, with all deference, that I cannot follow the learned Judge in what seems to me to be an assumption that the evidence mentioned in S. 4 (m), Criminal P. C., must be throughout between the same parties and on the same issues. Nor can I see that the fact that a judicial proceeding has reached a stage in which no more evidence is to be taken makes the rest of that proceeding non-judicial. If this were so, would not the delivery of judgment and the making of a decree in accordance therewith be nonjudicial proceedings?

Pargiter, J., delivered a dissentient judgment, in which he said: "The execution case was without dispute a "judicial proceeding," but it is contended by the applicants that the Court had finished that case in ordering possession to be given, so that the judicial proceeding had terminated, and that the Nazir's function of carrying out that order was a separate matter and was not part of the judicial proceeding. It has not been shown to us how the execution case had terminated. It was the Court's duty in executing the decree not only to pass an order to give

(1) [1888] 12 Bom. 36.
(2) [1905] 32 Cal. 367=9 C. W. N. 364=1 C. L. J. 161=2 Cr. L. J. 110.
(3) [1908] 35 Cal. 133.

possession but also to see that possession was given. Its duty did not end with the mere passing of the order, nor did the execution case terminate thereat. The Nazir was the hand of the Court for the purpose of giving possession and until possession was given the Court could not treat the case of executing the decree as completed. The resistance therefore to the delivery of possession, which resistance was reported by the Nazir was an offence brought to the notice of the Court in the course of a "judicial proceeding" within the meaning of S. 476, Criminal P. C."

Henderson, J., to whom the case was referred under S. 429, Criminal P. C., apparently adopted the reasoning of Harington, J., that the possibility of evidence being taken on an objection being raised by a third party did not bring the proceedings within the terms of S. 4 (m), Criminal P. C., but in his conclusion from that reasoning he went a great deal further and held that the judicial proceedings ended with the decree in the suit, after which there was no matter left for judicial decision between the parties, and therefore no part of execution proceedings can be called a judicial proceeding. This seems to me open to the same criticizms, perhaps in a greater degree, as those I have ventured to suggest on the judgment of Harington, J. But in *Bhola Nath Dey* v. *Emperor* (4), in which the facts were exactly similar to those of the case now before us, Rampini and Mookerjee, JJ., held that the Munsif had rightly acted under S. 476, Criminal P. C. The case of *Har Charan Mookerjee* v. *Emperor* (2) was cited before them, and they seem to have doubted its soundness, though without expressly dissenting from it, and they distinguished it on the ground that there "it was held that the Munsif had passed an order for possession, which finally determined the case." If the ruling in *Har Charan Mookerjee* v. *Emperor* (2) were to be accepted, the present case could also be distinguished in the same way, as the Court still had matters in connexion with the sale and money matters to determine, upon which evidence could legally be taken, and therefore the execution case was not finally disposed of. But I am very distinctly of the opinion of Pargiter, J., that proceedings in execution are judicial proceedings within the meaning of the Criminal Procedure Code till they are finally disposed of by the Court. *Har Charan Mookerjee* v. *Emperor* (2) and *Kanto Ram Das* v. *Gobardhan Das* (3) have been overruled, and *Bhola Nath Dey* v. *Emperor* (4) has been affirmed by the Full Bench of the Calcutta High Court in *Shaik Bahadur* v. *Eradatullah Mallick* (5): the learned Judges said: "We entertain no doubt that an execution proceeding is a "judicial proceeding"; the definition in S. 4, Cl. (m) of the Code of 1898, is clearly not exhaustive."

The principles which should guide the Court in dealing with an application for revision of this kind are well and clearly laid down in *In the matter of the petition of Alamdar Husain* (6). Strachey, C. J., said: "It has been held by this Court that the High Court has power in revision to set aside an order passed by a civil, criminal or revenue Court under S. 476 of the Code; and I assume that this view is correct. Still, one must have regard to the nature of the revisional jurisdiction, and must not, in a case arising under S. 476, any more than in any other case, allow what would virtually be an appeal from the order of the Court below. It is necessary, as in all other cases, to see whether there has been any error of law, any irregularity, any abuse of, or failure to exercise judicial discretion, such as would justify interference in revision. Now let us see whether there is any fault of that kind to be found in the Collector's proceeding. The condition of his acting under S. 476 is his forming the opinion that there was ground for inquiring into any offence referred to in S. 195. The test is his opinion, and not the opinion of any superior Court; and if he has formed a real opinion to the effect stated, he has power to act under the section, and he commits no error or irregularity in doing so, even though another Court may think the opinion erroneous. I say, if he forms a real opinion, because no doubt if a case arose in which the Court acted on merely fanciful grounds, on grounds so empty, so obviously wrong that it could not be said to have formed a serious judicial opinion at all, then this Court would probably hold in revision that there had been no such action as S. 476 contem-

(4) [1906] 10 C. W. N. 55=3 Cr. L. J. 142.

(5) [1910] 37 Cal. 642=6 I. C. 801.

(6) [1901] 23 All. 249.

plates. The opinion spoken of by S. 476 no doubt is a judicial opinion founded on evidence. If such an opinion has been formed, this Court ought not in revision to interfere merely on the ground that it disagrees with it: the case must go on."

This is also a very clear statement of the kind of basis there must be for the opinion, "that there is ground for inquiring into any offence," at which a Court must arrive before taking action under S. 476. It may be said that there is always ground for inquiring into any offence, even if there is only a vague suspicion that it has been committed. But this is wrong. To give only two reasons out of many, the Courts have no time to waste over cases in which there is nothing more than a bare possibility of a conviction and one unsuccessful prosecution in a case where there is a reasonable suspicion that the accused is really guilty does more harm than abstaining from prosecution in five such cases. This was explained by the Calcutta High Court in *Jadu Nandan Singh* v. *Emperor* (7). The learned Judges said: "The principle which should guide Courts in taking action under S. 195 or S. 476 is now well settled. No sanction should be granted unless there is a reasonable probability of conviction. It would be an abuse of the powers vested in a Court of justice, if sanction were given or upheld on the principle that, though the conviction of the party complained against is a mere possibility, it is desirable that the matter should be threshed out, so that it may be decided whether or not an offence has been committed. No doubt the authority which is called upon to grant a sanction under S. 195, or to take action under S. 476, need not, and should not, decide the question of guilt or innocence of the party against whom proceedings are to be instituted; but great care and caution are required before the criminal law is set in motion, and there must be a reasonable foundation for the charge in respect of which prosecution is sanctioned or directed."

We have therefore to see whether the Subordinate Judge in this case ever formed an opinion that there was any reasonable prospect of a conviction, and if so, whether there is any proper basis for that opinion. Both questions must I think, be answersd in the negative. The only opinion he states is that the 19 persons accused by the watchmen have committed the offences for which he directs that they shall be tried. There is no examination or even statement of the strength of the evidence to be produced against them. There naturally could not be anything of that sort, as no inquiry whatever was held beyond the sending of a request to the nazir to state whether the two watchmen were given orders of appointment in writing, to which he replied simply that those two men were appointed, omitting to state whether they were given written orders or not. Even then if the Subordinate Judge had formed any opinion such as is required by S. 476, all the materials he had for it were: (a) the report by the two watchmen, obviously and naturally instigated and engineered by the decree-holder, and necessarily open to suspicion if only on account of the very large number of people they affect to have recognized, (b) a report from the nazir which says nothing and has been misread as establishing a point of some importance, and (c) the written statement of the one out of 19 accused who admittedly was not present when the alleged offence was committed, which also has been misread and misconstrued and has had absolutely unjustifiable inferences drawn from it. In the words of the learned Chief Justice of the Allahabad High Court quoted above, the Court, in forming whatever opinion it did form, "acted on merely fanciful grounds, on grounds so empty, so obviously wrong that it could not be said to have formed a serious judicial opinion at all."

There is yet another reason why no Court should take action under S. 476 without inquiring very much more thoroughly into the matter than has been done here and being satisfied that there is what may be called a fairly good case against the accused. It is that persons complained against by a Court under S. 476 are deprived of the protection given to them by S. 203, Criminal P. C. against frivolous and unnecessary prosecution by other complainants. I conceive that, as S. 204 empowers a Magistrate to dismiss a complaint only after oral examination of the complainant, and the presiding officer of a Court who makes a complaint under S. 476 is exempt

(7) [1909] 37 Cal. 250=4 I. C. 710.

from oral examination, a dismissal of such a complaint under S. 203 would be illegal. Anyhow it would certainly be improper and no Magistrate probably would think of doing such a thing, because it is presumed that the Court making the complaint has already taken all the proper precautions to ensure that the accused party is not being unnecessarily or wantonly or frivolously prosecuted. For all these reasons I set aside the order directing that Shioshankarpuri and eighteen others are to be prosecuted. This will not of course prevent proceedings being again taken against them in a legal and proper manner, if such a course is deemed advisable.

P.N./R.K. *Order set aside.*

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* A. I. R. 1914 Nagpur 44

STANYON, A. J. C.

Mukundram and *others*—Plaintiffs—Appellants.

v.

Dayaram and *others*—Defendants—Respondents.

Second Appeal No. 733 of 1910, Decided on 27th June 1911, from decree of Dist. Judge, Hoshangabad, D/- 10th October 1910.

*** Evidence Act (1 of 1872), S. 34—What are books of account and when they can be called to be regularly kept explained—Entry in account books is always admissible but weight to be attached differs—Regular keeping of accounts if denied has to be formally proved.**

An entry to be admissible in evidence under S. 34, Evidence Act, must be shown to be in a book, that book must be a book of account, and that account must be one regularly kept in the course of business. [P 45 C 1]

(a) The term "book" may properly be taken to signify ordinarily a collection of sheets of paper bound together with the intention that such binding shall be permanent and the papers used collectively in one volume. [P 45 C 2]

(b) A book which merely contains entries of items, of which no account is made at any time, is not a book of account for the purposes of S. 34. The legislature did not intend to include in that category any record in which there is no process of reckoning. [P 46 C 2]

(c) The fact of regular maintenance and general occurancy of account books, if not admitted. must be formally proved by the evidence of some person competent to speak to the facts. [P 46 C 2]

The evidential value of account books will, of course, depend upon their formality and the checks against fraud secured by the method of keeping them, but that is not to be confused with admissibility. As regards admissibility S. 34 makes no difference between the cash books and ledgers of a large Bank, and the day book of a housekeeper. The difference lies in the weight to be given to the entries thereon. [P 46 C 2]

F. W. Dillon—for Appellants.

J. Mittra—for Respondents.

Judgment.—* * * In the present case the documents produced by the witness Damodhar (D. W. 12) were tendered in the first Court and admitted in the lower appellate Court as books of account kept in regular course of business entries wherein were admissible under S. 34. If therefore the documents were not proved to be account books regularly kept in course of business their admission was illegal, because proof of the entries therein would be in violation of S. 21, Evidence Act. There appears to be so much misapprehension in the Courts below as to the scope and application of S. 34 of that enactment, that it may serve some purpose to pause and examine its provisions before applying them to the facts of this case. The remarks of their Lordships of the Privy Council in *Jaswant Singh* v. *Sheo Narain Lal* (1) are instructive as to the variety in account books. Some may be, as described by the Subordinate Judge in the above case, of no evidential value, but merely a man's private record, prepared by him, as may be in accordance with his pleasure or convenience. "Other accounts may be so kept, and may so tally with external circumstances, as to carry conviction that they are true. And their Lordships continue. "The Evidence Act, S. 34, therefore enacts that entries in books of account regularly kept in the course of business shall be relevant evidence, though not sufficient of themselves to charge any person with liability." The admission of such entries on behalf of a person making them is an exception to the general rule laid down in S. 21 of the Act. Such entries were not admitted in English Common law unless they happened to be against the interest of the person making them or were made in the course of business by deceased persons: (Taylor's Evidence, p. 709; Best's Evidence, para. 501, 503; Roscoe's N. P. Evidence, 60-62). But equity Courts have gradually enlarged the exception, and regularly kept books of account have been accepted by them as evidence for many years, and now the rules of the Supreme Court recongize the justice and expediency of this practice:

(1) [1894] 16 All. 157=21 I. A. 6 (P.C.).

cf. O. 30, R. 7, of the rules of the Supreme Court 1897, as amended by the rules of July 1902. It is recognized that to use a system of regular accounts to sustain a particular fraud is so difficult and dangerous a procedure, that the Courts may guide their decisions by using entries in such a system, truth and accuracy and contemporaneous record being almost indispensable for the due carrying on of such accounts. In the case above cited their Lordships of the Privy Council found "a cash book, a bill book, and a ledger, all referring to one another." An examination showed correspondence to be exact in some items, and they remarked: "It must be confessed that to forge elaborate accounts extending over six years, or even to insert new sheets in such accounts, would be a most dangerous undertaking, and to make the different books correspond exactly would be a task of almost insuperable difficulty."

I have written enough to show that the words in S. 34, Evidence Act, "books of account, regularly kept in the course of business" are of the first importance in giving effect to the principle enbodied in the section. That principle is to admit only such statements recorded by a party in his own behalf as by their nature and circumstances are ordinarily beyond his power to tamper with, undiscovered for the purpose of a particular case. Therefore when an entry of that kind is tendered, it must be shown to be in a book, that book must be a book of account, and that acccount must be one regularly kept in the course of business. These essentials require to be carefully observed in this country where written fraud and forgery are extremely common and the responsibility of keeping accounts for the benefit of others is honoured in the breach rather than the observance. e. g., by money-lenders, mortgagee in possession, lambardars who collect for cosharers, persons in posses sion of landed property whereof the title is in dispute or litigation.

First, then, what is a "book"? In its ordinary sense it signifies a collection of sheets of paper bound together in a manner which cannot be disturbed or altered except by tearing apart. The bindingis of a kind which is not intended to be moveable in the sense of being undone and put together again. A collection of papers in a portfolio, or clip, or strung together on a piece of twine which is intended to be untied at will, would not, in ordinary English, be called a book. But so narrow a signification would not do in India, where accounts are often kept, on sheets of paper laced or threaded together in a manner which allows removal of any sheet at any time by the untying of a knot. Of this class are the bahis of practically every Marwari banker in India. The definition of "book" given in the English Copyright Act, 1845, S. 3, is that the term means and includes "every volume, part or division of a volume, pamphlet, sheet of latterpress, sheet of music, map, chart, or plan separately published." This is a special definition for the convenience of using a single word to answer the purpose of a particular Act, and would obviously misrepresent what the legislature had in mind when enacting S. 34, Evidence Act. It may be pointed out that even the Marwari bahis, though capable of being unbound without damage, are not made in that form for that purpose, but, when properly kept, are paged and intended not to be taken apart at any time for any purpose. I think the term "book" in S. 34 aforesaid may properly be taken to signify, ordinarily, a collection of sheets of paper bound together with the intention that such binding shall be permanent and the papers used collectively in one volume. It is easier however to say what is not a book for the purposses of S. 34, and I have no hesitation in holding that unbound sheets of paper, in whatever quantity, though filled up with one continuous account, are not a book of account within the purview of S. 34. The documents admitted on to this record by the lower appellate Court are not a book or books, and therefore the entries upon them were illegally admitted in evidence.

When the article produced is a book we have still to see that it is a book of account, for that is the only kind of book to which the section opens the door of relevant evidence. I am alive to the dictum of the Privy Council in *Deputy Commissioner of Bara Bankie* v. *Ram Pershad* (3) disapproving of the dictum

(2) [1900] 27 Cal. 118=26 I. A. 254=4 C. W. N. 417 (P.C.).

West, J., in *Munchershaw Bezonji* v. *New Dhurumsey Spinning and Weaving Company* (3), as giving too limited a meaning to the section. But there is nothing in that case which gives any undue extension to the word "account" beyond its usual significance. To account is to reckon, and I am unable to conceive any accounting which does not involve either addition or subtraction or both of these operations of arithmetic. A book which contains successive entries of items may be a good memorandum book ; but until those entries are totalled or balanced, or both, as the case may be, there is no reckoning and no account. In the making of totals and striking of balances from time to time lies the chief safeguard under which books of account have been distinguished from other private records as capable of containing substantive evidence on which reliance may be placed. A private diary may be most regularly kept and contain records of facts, contemporaneously made, of the utmost value. It may be used for contradicting or corroborating a witness or refreshing his memory and the like under Ss. 144, 157 and 159 and others of the Evidence Act ; for such user does not make the document itself evidence : cf. *Ramji* v. *Rangayya* (4). It may also come in under S. 32 (2) if the requirements of that section are satisfied. But no entry in such a diary can be filed as documentary evidence of the facts stated in it in favour of the person making the entry if he is a party to the suit. It would be excluded by S. 21 of the Act, and S. 34 provides no exception in favour of it. The reason for such differentiation between a private diary and a private account is manifest.

An account, regularly kept, necessarily results in a continuity which makes fraudulent addition extremely difficult and dangerous : it is a chain of forged links into which the subsequent interpolation of a link of forgery without discovery is almost impracticable. The man who wishes to defraud his neighbour generally avoids keeping regular accounts, or, having kept them, suppresses them. The labour of weaving falsehood with truth in regularly kept accounts is too great and continuous to be popular, because of the mathematical connexion running through them. But these safeguards of truth are entirely absent in the most regularly kept of private diaries, and subsequent interpolations, to meet an unexpected demand and facilitate fraud, are generally possible without difficulty and danger of discovery. It is clear that the legislature, which guides itself by human experience, had such considerations before it when it enacted, by S. 34, an exception to S. 21, in favour of books of account. I am therefore of opinion that the legislature did not intend to include in that category any record in which there is no process of reckoning. Therefore, a book which merely contains entries of items, of which no account is made at any time, is not a book of account for the purposes of S. 34. The papers produced by D. W. 12 in this case are entirely devoid of totals and balances. Therefore, the entries in them never ripened into accounts, and such entries—which could obviously be fraudulently added to or penned through at any time without hindrance or discovery —are not admissible under S. 34.

Finally, when we have got books of account, properly so called, we must see that they have been regularly kept. This does not mean, as is frequently supposed, that they must be maintained in a particular form favoured by bankers—usually called the mahajani system. Their evidential value will, of course, depend upon their formality and the checks against fraud secured by the method of keeping them ; but that is not to be confused with admissibility. A single account-book, however simple, if regularly kept, will be admissible. As regards admissibility, S. 34 makes no difference between the cash books and ledgers of a large bank, and the day book of a house keeper. The difference lies in the weight to be given to the entries therein. But, where the fact of regular maintenance and general accuracy of account-books is not admitted, it must be formally proved. In *Dwarka Doss* v. *Jankee Doss* (5) their Lordships of the Privy Council pointed out that "the regular proof of books and accounts requires that the clerks who have kept those accounts, or some person competent to speak to the facts, should be called to prove that they have been regularly kept, and to prove their general accuracy." In the present

(3) [1879-80] 4 Bom. 576.
(4) [1862-63] 1 M.H.C.R. 168.
(5) [1854-57] 6 M.I.A. 88=19 E. R. 33.

case nothing of the kind has been done, and the record of the first Court endorsed on the accounts that they are unproved is a perfectly correct record. There is frequently confusion in the Subordinate Courts as to how an account-book should be proved and used under S. 34 aforesaid. It is a common practice to call a witness and examine him, as to the particular items sought to be proved, by getting him, as it were, to read them out to the Court, sometimes when he has no personal knowledge concerning them and they are not in his handwriting. Meanwhile, it is taken for granted, without formal proof, that because the book is the khata or robkar of some firm, it is regularly kept. The question whether or not a book is regularly kept is one of fact, to be proved (if not admitted), according to the circumstances of each case.

Where an entry is properly admitted it is mere waste of time to have its contents repeated out of the mouth of a witness who merely reads it and cannot supplement it with his personal knowledge. Use of an entry to refresh memory is one thing : its proof as substantive evidence under S. 34 is another ; but this distinction is constantly lost to sight by Judges and practitioners. A clerk called as a witness may depose : "I remember paying out Rs. 100 as a loan to the defendant some time last year. Having now refreshed my memory from an entry made at the time in my master's cash-book I can state that the date was 15th June 1910." This is not a case of evidence under S. 34, Evidence Act. But suppose the account book had been produced and the entry tendered in evidence. Then the deposition of the clerk might have been in these terms : "I know the defendant. I remember that he came to my master's shop and borrowed some money last year. I cannot remember the amount lent or the date of the loan though I saw the money paid. I also saw another clerk make an entry of the loan in my master's cash day book. This book (Ex. A) shown to me is that in which the entry was made. It is regularly kept. Transactions are entered as they occur, and the book is totalled and balanced every day, and entries carried into a ledger once a week. This book (Ex. B) is the ledger for last year and the entry of defendant's loan should be in it." Upon this testimony the Court would be justified in admitting the entries tendered by the plaintiff and using them to corroborate the witness, and prove the amount and date of the loan. It would be waste of time and miss the point of S. 34 to get the witness to give oral evidence of the contents of the entries by reading them out. Once they are qualified for admission under S. 34, the Court itself can read them and use their contents for its information,

For the reasons I have given I hold that the documents admitted by the lower appellate Court are not account books at all, and there is no proof that they were regularly kept. Their admission in evidence was therefore illegal, and the finding of the lower appellate Court on the basis of them is bad. That finding is therefore set aside, and the finding of the first Court restored on the question of the alleged repayments for which defendant claimed credit.

P.N./R.K. *Appeal allowed.*

A. I. R. 1914 Nagpur 47

MITTRA, A. J. C.

Chowbe Jaigopal—Plaintiff — Appellant.

v.

Rameshwar—Defendant—Respondent.

Second Appeal No. 518 of 1912, Decided on 27th October 1913, from decree of Dist. Judge, Hoshangabad, D/- 8th July 1912.

Landlord and Tenant—Lambardar—Partition proceedings instituted — Lambardar's power as agent of proprietary body does not cease.

The mere institution of partition proceedings does not put an end to the customary authority of the lambardar, as representative of the proprietary body, to consent to a transfer by an absolute occupancy tenant of his holding.

[P 48 C 1]

G. L. Subhedar—for Appellant.

V. R. Pandit—for Respondent.

Judgment. — The plaintiff has a five annas four pies share in Mauza Pairagarh and one Sadaseo was owner of the remaining 10 annas eight pies and lambardar. On 31st July 1908 the plaintiff applied to the revenue authorities for partition of the village. The partition was sanctioned in January 1911 and it took effect from 1st June 1911. One Gangaram, an absolute occupancy tenant, sold his holding to the defendant on 31st May 1910. The registered sale-deed bears the attestation of the

lambardar Sadaseo. The plaintiff sues for possession of the holding on the ground that 'the transfer in favour of the defendant is void as against the plaintiff. The Courts below have dismissed the plaintiff's suit on the ground that the transfer was with the consent of the lambardar. The plaintiff has filed this second appeal. The first point taken is that the institution of the partition proceedings put an end to the customary authority of the lambardar. There is no suggestion of fraud or collusion against the lambardar, nor is it the plaintiff's case that the consent to the transfer was improperly given, having regard to the nazarana taken by the lambardar. The plaintiff's sole contention is that he was not consulted. The plaintiff never gave any notice revoking the authority of the lambardar to represent the proprietary body. No ruling has been cited to show that the mere insititution of partition proceedings would put end to the powers of the lambardar. At the date when the consent was given, it was not known to whose share the plot would go. The fact that the plot is now in the plaintiff's patti does not entitle him to repudiate the act of the lambardar, unless his customary agency is ipso facto determined by the institution of the partition proceedings. Such a contention is opposed to the ruling of this Court in *Ram Chandra* v. *Tatya* (1), where it was held that even after a partition the lambardar does represent the proprietary body for certain purposes. The second ground taken is that the consent to the transfer was a dealing with the property within the meaning of S. 52, T. P. Act. It is unnecessary to consider this point, as on the view I have taken the dealing with the property was one by the plaintiff's agent and it cannot be questioned as against the present defendants. The appeal fails and is dismissed with costs.

P.N./R K. *Appeal dismissed.*

(1) [1913] 9 N. L. R. 46=19 I. C. 549.

A. I. R. 1914 Nagpur 48

MITTRA AND PRIDEAUX, OFFG. A. J. Cs.

Fagwa—Defendant—Appellant.

v.

Budhram and *others*—Plaintiffs—Respondents.

Second Appeal No. 627 of 1912, Decided on 20th October 1913, against decree of Divl. Judge, Chhattisgarh Division, D/- 6th August 1912.

(a) C. P. Land Revenue Act (18 of 1881), S. 65-A (as amended upto 1898)—Precarious leasehold is property—Entry in certificate under S. 65-A is not conclusive whether property is joint or separate—Status of protected thekedar acquired by joint family funds—Property is joint—Priority of zamindar's contract does not affect rights of members inter se—Amending Act of 1898 is not retrospective.

Land held on lease, even of a precarious tenure, is all the same property, such as the law recognizes. The mere fact of the certificate of protected status under S. 65-A of the amended Central Provinces Land Revenue Act, 1881, being issued in the name of a particular individual is not conclusive of the question whether it enures for the benefit of the family which he then represented before the settlement officer or for his own personal benefit. [P 50 C 2]

Where the protection is earned by reason of the possession of another member of the family and the family funds have been utilized for the improvement of the land the family being joint the protection would enure for the benefit of the family and the property would be the joint property of all the members. [P 51 C 1]

The question of the priority of contract between the zamindar and the several members of the family does not affect their right as against each other.

The amending Act of 1898 does not affect the vested rights of persons.

(b) Hindu Law—Joint family—Joint property remains so—Even right of partition is taken away by subsequent statute.

Property which is joint property and enjoyed as such, does not cease to be joint property merely because a subsequent statute does not recognise a partition. [P 51 C 2]

The absence of a right to partition does not prevent property which has been held and treated as joint property from being joint property so far as its enjoyment is concerned. [P 52 C 1]

(c) C. P. Land Revenue Act (18 of 1881), S. 66—Duties are to be performed by all members and not only by one in whose name certificate stands.

It is not only the person in whose name the certificate of protected status is issued, but also every other person entitled to the benefits of a protected thekadar, that is bound to perform the duties prescribed by the law for such a thekadar. [P 52 C 2]

(d) Hindu Law — Joint family — Property purchased by savings from thekadari in name of only one member is joint.

Property purchased by the savings or anticipations of the income derived from the theka-

dari property of the family, although in the name of one of the members of the family, would be joint family property. [P 52 C 2]

V. R. Pandit and *S. R. Pandit*—for Appellant.

F. W. Dillon—for Respondents.

Judgment.—The following genealogical tree will show the relationship between the parties:

AMARSING

Sakhru — Pathari

Fagwa (defendant)

Budhram (Plff. 1) — Koliha (Plff. 2) — Nanku (Plff. 3)

In the plaint it was stated that the parties separated about 25 years ago, that is, about the year 1884. This position has been now abondoned and we must proceed to state the facts admitted before us. The village of Parsathi in the zamindari of Fingeswar was held on lease by Amarsing for a number of years. On his death the lease was in the name of Sakru and the zamindar's register shows his name as the thekadar from 1881 to 1889. In 1890 the names of both Sakru and Pathari are entered as lessees. Sakhru according to Mohanlal, the zamindar's dewan (D. W. 1), died 20 years ago, that is in 1890. In 1891 a certificate of protected status was issued in the name of Pathari (Ex. P-4). The conditions mentioned in the certificate are an exact translation of the zamindari Wajibularz of the then current settlement of the Raipur District. The leases prior to 1891 were temporary leases. Whether they were for any fixed term or annual leases cannot be ascertained. It is admitted that the family was joint in mess, residence and estate in 1891. Separation in mess and residence has taken place quite recently and there has been no partition of any property yet. That the parties enjoyed the profits of the thekadari village jointly in 1891 and probably in subsequent years is not disputed, but it is not clear up to what date this state of things continued. In 1905 a village called Chipridih was purchased in the name of plaintiff 1 alone. It is however admitted that Pathari and his three sons are owners of this village. The present suit is for a declaration that the defendant has no share in the village recently purchased. The parties are now agreed that Chipridih was acquired from the savings or anticipations of the income derived from the thekadari village of Parsathi. It is conceded that if the ordinary Hindu law applies, the plaintiffs' suit is bound to fail. But the contention on behalf of the plaintiffs is that the certificate of protected status created a new right personal to Pathari alone, and that Sakhru's son has, in the eye of the law, ceased to have any interest in the profits of Parsathi, even if he was maintained out of them.

The Land Revenue Act, 1881, as originally passed, contained no provision for the protection of thekadars. Act 16 of 1889 introduced S. 65-A which was in the following terms:

"The settlement officer may inquire into the claim of any person holding from a proprietor a village or part of a village as thekadar, gaontia or farmer, and may, with the previous sanction of the Chief Commissioner, provide in the terms of settlement for the protection of such thekadar. gaontia or farmer against arbitrary enhancement or ejectment:

"Provided that the protection of a thekadar, gaontia or farmer shall not be provided for under this section unless he or those from whom he has inherited was or were in possession of the village at the last settlement of the local area in which the village is situate, or unless it is proved to the satisfaction of the settlement officer that he or those from whom he has inherited has or have established the village or substantially improved it at his or their own cost."

This was all the legislative provision on the subject. Apparently in anticipation of contemplated legislation on the subject the policy of the Government was introduced into the Wajibularz as conditions of the tenure. We note however that neither the certificate nor the zamindari Wajibularz governing the case contains any provision regarding the impartibility of the tenure or its devolution by the law of primogeniture. It is declared to be heritable but not transferable by sale, gift or mortgage. In 1895 Stevens, J. C., in the case of *Shamsuddin Ahmad Khan* v. *Shaikh Amir Alee* (1) held that the rights of a gaontia with protected status are liable to sale in execution of a decree. This case, though

(1) [1896] 9 C. P. L. R. 134.

not cited before us, has an important bearing on the question whether a mere personal privilege or a right was created by the amending Act of 1889. The defect in the law has now been remedied by the amending Act (Act 12 of 1898), which prohibits sale in execution of a decree.

In our opinion, the right mode of dealing with the case is to start with an examination of the rights of the parties as they stood before the Act of 1898 and then to consider what changes, if any relevant to the case have been introduced by the present statute law on the subject. The learned counsel for the respondents has invited us to express an opinion on points not strictly arising in the case. We note that Pathari is still alive and no question as to the future devolution of the tenure can yet arise for decision. We propose to confine our judgment to only such points as call for a decision in this case.

There can be no doubt that the property, such as it was, was joint family property in 1891. It is true the lease was of a precarious tenure liable to be determined by a notice to quit or if it was a lease for a term of years, on the expiration of the term. All the same it was property, such as the law recognizes. In 1891 the profits were enjoyed by the family in the same way as they would be doing in the case of any other property. It was the defendant's father who was registered as the lessee for the previous eight years. Pathari earned his protection by reason of Sakru's previous possession, and unless there is something in the statute, which clearly makes it the exclusive property of Pathari, it is difficult to see why Sakhru's son will not have a share in it.

It is argued that S. 65-A as it stood in 1891 contemplates a thekadar, and not more than one, as the possible recipient of the benefits of the section. We are unable to agree with this contention. The General Clauses Act (1 of 1868) lays down that words in the singular shall include the plural. We must not allow our judgment to be obscured by the policy of later legislation. If two persons have equally earned the protection given by the statute, by reason of their having jointly improved a village with the aid of joint funds, how is the settlement officer to select one to the exclusion of the other when there is nothing to show that the one resigns his claim in favour of the other. If the protection contemplated by the Act of 1889 was meant to be limited to one person only, the statute would have laid down some principle on which the settlement officer is to Judge between conflicting claims. We can find nothing in the settlement Code by which the discretion (if the settlement officer has a discretion in the matter) is to be exercised in favour of one person rather than in favour of the other. Mr. Dyer, the present settlement officer of Nagpur, has kindly furnished us with a note which shows that at least in two cases Sir Reginald Craddock in his settlement of the Nagpur District in 1894, recognized the claims of more than one person as entitled to protection. These were in the villages of Waregaon (Nagpur Tahsil) and Thokhabardi (Umrer Tahsil). This conclusively shows that our interpretation of S. 65-A as it stood in 1891 is in accordance with the view then entertained by those who were called upon to give effect to that section. We have therefore come to the conclusion that the mere fact of the certificate being issued in the name of Pathari is not conclusive of the question whether it enures for the benefit of the family which he then represented before the settlement officer or for his own personal benefit. In our opinion the answer depends on whether the claims of Pathari or the claims for the family were recognized by the settlement officer, and looking to the history of the village there can be but one answer.

The learned counsel for the respondents has argued that a lease creates a personal contract and that the members of a Hindu joint family can claim no interest in leasehold property when the lease is in the name of one member alone and in support of this he cites the case of *Anant Ram* v. *Takatsing* (2). Where a lease is given to and accepted by a person in a representative character, it is not open to the lessor to deny the title of the other members of a joint Hindu family. The case cited was one in which the contest arose between the lessor's representatives and the lessees. In such a case there is ordinarily no presumption of a privity of contract between the lessor and the members of the joint

(2) [1891] 4 C. P. L. R. 57.

family other than the lessee. In this case we are concerned with the rights of the members of the family inter se and not their rights against the lessor. *Subbayya* v. *Chellamma* (3) which deals with a case of waste land taken up by a person from the tahsildar, lays down that "the true test is whether it was brought under cultivation by family or self-acquired funds and the onus probandi lies upon those who allege the latter." If family funds were utilized for the improvement of the village, then as between the members of the family of the lessees, it was joint property. In the present case it is not necessary to say what rights these members have as against the lessor. We hold that even if there is no privity of contract between the defendant and the zamindar, it is not open to the plaintiffs to rely on that circumstance as in any way affecting the defendant's rights.

In our opinion the effect of the order of the settlement officer was to curtail the rights of the zamindar of Fingeswar in the matter of ejectment and enhancement of rent. The fact that the certificate was issued in the name of Pathari alone does not affect the right of the defendant as against Pathari.

In this case there was no relinquishment by the defendant or on his behalf of the then existing rights under the lease. It does not appear that the lease had come to an end in 1891. There was a "reasonable expectation that the lease will be renewed" within the meaning of the decision of Warrington, J., in *Bevan* v. *Webb* (4). Under these circumstances S. 90, Trusts Act, would apply, just as if Pathari got a renewal of the lease in his own name from the zamindar. S. 90 says that where a co-owner by availing himself of his position as such, gains an advantage in derogation of the rights of the other person interested in the property, or where any such owner, as representing all persons interested in such property, gains an advantage, he must hold, for the benefit of all persons so interested, the advantage so gained. In other words as between the members of the family, Pathari would be a trustee for Sakhru's son, and cannot deny the latter's title, even though the legal title is solely vested in Pathari. In our opinion the decision of Stevens, J. C., suggests that the right recognized by the settlement officer is not merely a personal privilege.

Now up to 1898 there was nothing in the law to prevent a partition between Pathari and Sakhru of this village. If such a partition had taken place before 1898, it would have been valid, for the Act of 1898 only prohibits future partition, "save in so far as any arrangements are in force at the time of the declaration." In our opinion this Act also clearly recognizes the possibility of a thekadari village being held under an arrangement in the nature of a partition at the time of the declaration and also the possibility of there being more than one person whose claim has to be inquired into and recognized if the statutory conditions are fulfilled.

The main argument for the plaintiff is that whatever rights the defendant had in the property were taken away by the amending Act of 1898, for it is contended that there can be no joint property without a right to partition. We confess our inability to appreciate this argument. If the defendant had an interest in the village, there is absolutely nothing in the Act of 1898 to suggest that this vested interest was intended by the legislature to be taken away from him. Property which is joint property and enjoyed as such, does not cease to be joint property merely because a subsequent statute does not recognize a partition. It is possible to argue that the whole of the incidents described by the Act of 1898 apply only to a declaration of protection made under the Act of 1898, but we have assumed for the purposes of argument in favour of the plaintiffs that these would also apply to protected status declared under the Act of 1889. Now S. 136-B, Land Revenue Act, prohibits a perfect partition in the Sambalpur District and the Wajabularz of Mr. Nethersole's Settlement says that "no cosharer in a gaontiahi village or a muafi vallage can claim to have his share partitioned and separated. A ryot of a village in which sharers have made a private partition among themselves, can always claim to his revenue direct to the lambardar gaontia instead of the cosharer." It cannot be seriously argued that these restrictions on the right to partition have taken away from co-

(3) [1886] 9 Mad. 477.
(4) [1905] 1 Ch. 620= 74 L. J. Ch. 300= 93 L. T. 298=53 W. R. 651.

sharers in Sambalpur khalsa villages all rights of property and conferred them on the lambardar gaontia. The case of *Narayan Jagannath* v. *Vasudeo Vishnu* (5), cited by the appellant's learned counsel gives an instance of impartible joint property—saranjams—the impartiblity being a condition imposed by the grantor, that is the Government.

The respondents have cited three cases in support of their argument that where there is no right to partition, there can be no joint property. The first case is the well-known case of *Sartaj Kuari* v. *Deoraj Kuari* (6) where their Lordships of the Privy Council laid down that the son's right by birth in ancestcal property under the Mitakshara is so connected with the right to obtain a partition of the estate, that it does not exist in impartible estates. It was held that a son cannot question his father's alienation of an impartible estate. But this does not show that the absence of a right to partition prevents property which has been held and treated as joint property from being joint property so far as its enjoyment is concerned. The next case cited is to the same effect : *Sri Raja Rao Venkata Surya Mahipati Ram Krishna Rao Bahadur* v. *The Court of Wards* (7). Here again the question was whether an adopted son acquired an interest by adoption in ancestral impartible estate so as to entitle him to question his father's alienation by will. The third case cited, *Lekhraj Kunwar* v. *Harpal Singh* (8), seems to support Mr. Mayne's view as stated in para. 279 of his Text-book on Hindu Law, Edn. 7 : " Liability to partition is one of the commonest incidents of joint property, but it must not be supposed that joint property and partible property are mutually convertible terms. If it were so, an impartible zamindari could never be joint property. The reverse however is the case. The mode of its enjoyment necessarily cuts down to a very small point the rights of the other members of the family with respect to it . . . . . It has been repeatedly held by the Privy Council that the order of succession to a zamindari depended upon whether though impartible, it was part of the common family property, or was the separate or self-acquired property of the holder." Mr. Mayne cites amongst other cases the well known case of *Katama Natchair* v. *The Raja of Sivagunga* (9). The latest case referred to above [*Lekhraj Kunwar* v. *Harpal Singh* (8)] is an instance where the widow was excluded by a distant male relation.

There is an argument advanced by the learned Divisional Judge which remains to be noticed. He assumes that the liabilites of a thekadar can only be enforced against the person in whose name the certificate is granted. From this he argues that " the legislature must have intended that these duties and liabilities connoted some rights and privileges." This, in our opinion, is begging the question. The section lays down the duties of a protected thekadar, independently of the fact whether the certificate is in his name or not. If the defendant is entitled to the benefits of a protected thekadar, he is equally bound to perform the duties prescribed by the law for such a thekadar.

We have come to the conclusion that the plaintiffs and defendant are joint owners of the thekadari village and the village purchased out of its income is joint family property. The decree of the lower appellate Court is reversed and the plaintiffs' suit is dismissed with costs in all the Courts. The fees for legal practitioners should be calculated in the decree of the lower appellate Court.

P.N./R.K. *Appeal allowed.*

(5) [1891] 15 Bom. 247.
(6) [1888] 10 All. 272=15 I. A. 51=5 Sar. 139 (P. C.).
(7) [1899] 22 Mad. 383=26 I. A. 83=3 C. W. N. 415=9 M. L. J. Sup. 1 (P. C.).
(8) [1912] 34 All. 65=13 I. C. 269 (P. C.).
(9) [1861-63] 9 M. I. A. 539=2 W. R. C. R. P. C. 31=1 Suth. 520=2 Sar. 25=19 E. R. 843.

A. I. R. 1914 Nagpur 52

MITTRA, OFFG. A. J. C.

Bhadia—Plaintiff—Appellant.

v.

Mt. Bhagi—Defendant—Respondent.

Second Appeal No. 234-B of 1912, Decided on 4th August 1913, against decree of Addl. Dist. Judge, Amraoti, D/- 6th March 1912.

Hindu Law—Succession—Sister is preferable to uncle's son in Berar.

Under the Mitakshara law, as interpreted and followed in Berar, a sister comes after the paternal grandmother, but before the paternal grandfather and therefore necessarily before any descendant of the grandfather, e. g., uncle's son: ♀ *M.I.A.* 520 ; 24 *Bom.* 563 and 11 *M. I. A.*

386, *Foll.* ; 2 *Berar L. J.* 135 and 32 *Bom.* 300, *Diss. from.* [P 54 C 2]

Bepin Krishna Bose—for Appellant.

F. W. Dillon—for Respondent.

Judgment.—The point involved in this appeal is whether the sister or the paternal uncle's son is a preferential heir in Berar. The law applicable is the Mitakshara as interpreted and followed in Western India: *Ramprasad* v. *Mt. Subu Bai* (1) and *Bayana* v. *Dinkar* (2). The sister is not an heir under the Mitakshara according to the Calcutta and Allahabad High Courts and the same view prevails in the Central Provinces.

The appellant's learned advocate however is not prepared to go so far as to contend that she is not an heir in Berar. Such a contention, if raised, would be untenable, seeing the number of cases in which the rights of collateral females, including the sister not recognized elsewhere, have been for years recognized in Berar. The argument for the appellant is that the sister is not a sagotra sapinda and that at any rate she cannot come in before the uncle's son who is expressly named in the Mitakshara. It is suggested that she may be regarded as a bandhu as held by the Madras High Court. The earlier Bombay rulings, it is urged, proceeded partly on the Mayukha and partly on the interpretation of Nanda Pandit and Ballambhat of the word "brothers." And now that it has been held in Bombay that the latter interpretation is unsound and the Mayukha is not a paramount authority outside Gujarat and the island of Bombay, this Court should reconsider the position of the sister in Berar. For the respondents, reliance is placed on a judgment of Mr. Obbard, Judicial Commissioner of Berar, delivered in 1896 and reported as *Girjabai* v. *Venkatesh* (3). The recent judgment of *Bhagwan* v. *Warubai* (4) from Sholapur is also relied on by them.

It seems to me that if we were to confine ourselves to the Mitakshara and the Mitakshara were to be interpreted as a modern code, the argument for the appellant would be unanswerable. Only the learned advocate would have to go futher than he is prepared to go. The sister is probably not a gotraja (literally, one born in the family) in the sense in which Vijnaneshwar understands the term, as synonymous with sagotra or samangotra (one of the same family), for a woman on her marriage is "born again in the family of her husband." She will not only have to be placed after the uncle's son, but after the great-grandfather, his sons and their issue" who are named in Ch. 2, S. 5, para. 5, just as the uncle's sons are mentioned in the preceding paragraph of the Mitakshara. To introduce so near a relation as sister at that stage would be opposed to the spirit of the Mitakshara, where propinquity is the rule of succession. Her claim as a bandhu has been apparently denied by the Privy Council, *Thakoorain Sahiba* v. *Mohun Lall* (5), and she has never been recognized as such in Western India. To relegate her now for the first time in this side of India to the position of a bandhu would be doing what the Privy Council has condemned. "To alter the law of succession as established by a uniform course of decisions, or even by the dicta of received treatises, by some novel interpretations of the vague and often conflicting texts of the Hindu commentators, would be most dangerous, inasmuch as it would unsettle existing titles :" *Thakoorain Sahiba* v. *Mohun Lall* (5). The result would be, as held elsewhere, that the sister is not an heir.

Mr. Obbard in the judgment above cited practically admits that under pure Mitakshara, the sister would have no claim. He rests her title as heir on the "law compounded of Mitakshara, Mayukha and custom." I agree with the learned Judicial Commissioner that the sister's claim was founded on custom, mainly influenced by the Mayukha, even in places where Nilkanth's authority is not supreme. The answers of the Shastris in the Ahmednagar and Sholapur cases cited in West and Buhler (3rd Edn., pp. 468-69) show that the Mayukha was freely cited as apparently not in conflict with the Mitakshara, which was treated as silent on the point though a work of paramount authority in those districts. She was certainly not treated as a bandhu, for in that case the reference to the Mayukha would be unintelligible. If she could be regarded as a bandhu, probably as the Madras High Court thinks she would be excluded by her son : *Laksh-*

(1) [1908] 4 N. L. R. 31.
(2) [1909] 6 N. L. R. 39=5 I. C. 748.
(3) [1896] 2 Berar L. J. 135.
(4) [1908] 32 Bom. 300=10 Bom. L. R. 389.
(5) [1866-67] 11 M. I. A. 386=7 W. R. 25=20 E. R. 146 (P.C.).

manammal v. *Tiruvengada Mudali* (6), and this was obviously never the case in Western India. The doctrine that the sister is a gotraja within the meaning of the text of Yajnavalkya is too well established there to be now controverted. An attempt has been made by Chandavarkar, J., in *Bhagwan* v. *Warubai* (4) to show that the view of the western school regarding gotraja sapindas is not absolutely inconsistent with the Mitakshara. It is sufficient for me to say that probably some such reason induced the pandits on the Bombay side to introduce the sister in the Mitakshara country. But as Mr. Mayne says : "It is probable that the whole of this reasoning is a mere contrivance to bring a succession, which was established by immemorial usage, into apparent conformity with Sanskrit law. . . . . The usage itself is established beyond doubt, and has received the sanction of the Privy Council :" Mayne, 7th Edn. p. 720. The case referred to by Mr. Mayne is the case of *Venayeck Anundrow* v. *Luxumeebaee* (7).

The argument that the sister, even if a gotraja sapinda, should come after all the persons expressly named in S. 5, Ch. 2 of the Mitakshara has been already noticed by me in an earlier part of this judgment. It seems that para. 1, S. 5 gives the definition of gentiles. "Gentiles are the paternal grandmother and relations connected by funeral oblations of food and libations of water" or, more accurately, relations connected by common particles of body. The rest of the sections seems merely illustrative of the principles governing the order of succession—at any rate this is the view which has apparently found acceptance in the Bombay Presidency, for the sister is placed immediately after the paternal grandmother.

In obedience to custom, the sister has been declared an heir, but it seems to me impossible to ignore that her place in the order of succession is based on the Mayukha. The view of Nanda Pandit and Ballambhat that the word "brothers" includes sister—a view which would place her in a still more favourable position than the one assigned to her in the Mayukha—has never found general acceptance, as pointed out by Sir Lawrence Jenkins, in *Mulji Purshotum* v. *Cursandas Natha* (8) and also by Chandavarkar, J., in the case above cited. Under the circumstances the Mayukha seems to be the only guide for determining her place in the order of succession. She comes then after the paternal grandmother and before the paternal grandfather and therefore necessarily before any descendant of the grandfather such as the plaintiff-appellant is.

I note that no attempt has been made to distinguish this case from the one decided by Mr. Obbard, though the learned Judicial Commissioner confined his remarks to the case of Mahratta Brahmins. In my opinion such a distinction would be unfounded, for the Bombay law has been since applied indiscriminately to all Hindus in Berar, treating it as the lex loci.

The appeal fails and is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

(6) [1882] 5 Mad. 241.
(7) [1861-63] 9 M. I. A. 520=19 E. R. 834.
(8) [1900] 24 Bom. 563=2 Bom. L. R. 721.

A. I. R. 1914 Nagpur 54

MITTRA, OFFG. A. J. C.

Jiwanlal—Plaintiff—Appellant.

v.

Chudaman—Defendant — Respondent.

Second Appeal No. 247 of 1913, Decided on 21st January 1914, from decree of Dist. Judge, Seoni, D/- 28th February 1913.

Registration Act (16 of 1908), S. 17—Maintenance grant to Hindu widow need not be in writing.

Under the Hindu law, no transaction need be in writing; therefore a grant of immovable property to a Hindu widow for maintenance is perfectly valid if proved by oral evidence. [P 55 C 1]

A. C. Roy—for Appellant.

J. C. Ghosh—for Respondent.

Judgment. — The lower appellate Court has assumed that a grant of immovable property to a Hindu widow for maintenance can only be made by a registered instrument. No reasons have been given by the District Judge for this view. The Munsif thought that this was the effect of S. 17, Registration Act. But in this case there was admittedly no document. If there had been a document evidencing the grant, it would have required registration.

The Registration Act is silent as to whether a transaction must be in writing or not. No doubt the Transfer of Property Act requires certain transfers of certain value to be by a registered

instrument. But this is not a case of sale, gift, mortgage, or lease. The transfer in question is one not specifically dealt with by that Act. The question must therefore be decided under the Hindu law. No transaction need be in writing under that law. Therefore the grant, if proved by oral evidence, would be perfectly valid. The decree of the lower appellate Court is reversed and the case remanded to that Court for a fresh decision with reference to the above remarks. There will be no order for refund of court-fees. Other costs will follow the result.

Decree reversed ;
Case remanded.

P.N./R.K.

A. I. R. 1914 Nagpur 55

STANYON, A. J. C.

Sambhasheo—Defendant — Appellant.

v.

Mahadeo—Plaintiff—Respondent.

Second Appeal No. 176 of 1913, Decided on 12th February 1914, from decree of Dist. Judge, Chanda, D/- 27th November 1912.

Specific Relief Act (1 of 1877), S. 9—Question of title is immaterial—On basis of possession even true owner can be ejected.

Section 9, Specific Relief Act, in no way controls the operation of S. 110, Evidence Act. It has no concern whatever with title, but is merely a law for restoring a possession which has been disturbed otherwise than in due course of law, and may properly be used to eject even a true owner who has disturbed a peaceful possession. [P 56 C 1]

The possession which attracts the presumption of ownership is a juridical possession obtained *nec vi, nec clam, nec precario, ab adversario*, and stands valid against all the world except the person legally entitled. [P 57 C 2]

Atmaram Bhagwant—for Appellant.

Judgment.—The parties own and occupy premises which adjoin one another in the town of Chanda. Their dwelling houses are separated by a piece of open land, bounded on one side by the public road. In 1910 the defendant completely closed entrance on to this land from the road by putting up a wire fence along the roadside for the whole distance between his own house and that of the plaintiff. The defendant further entered upon exclusive use of the land by stacking his wood thereon. The plaintiff sued to have the wire fence removed and the defendant ejected from a portion of the land, a strip 5/1/2 feet wide, claiming that the same belonged to him and afforded ingress and egress to his latrine attendant. The Courts below have found that previous to 1910, when the defendant forcibly entered thereon, the plaintiff had "for a long time" been in possession and enjoyment of the land in dispute, though his original title to the same, or his acquisition of a title or easement by prescription, had not been proved. On this finding the Courts have given the plaintiff a decree ordering the defendant to remove his wire fencing and his wood, and to leave the land free to the plaintiff as before 1910. Both Courts surmise that the disputed plot may be, but do not actually find that it is, nazul land. Against the above decree the defendant has made the present appeal.

The Courts below have not considered the bearing of S. 110, Evidence Act, 1872, on the facts found by them. The plaintiff has not proved any title to the land apart from any presumption arising from his possession. But he has proved that he was in peaceful possession when he was forcibly ousted by the defendant in 1910. The plaintiff did not avail himself of the summary remedy provided by S. 9, Act 1 of 1877, for restoration of his disturbed possession. He has brought this regular suit for the purpose. The question that arises is whether he must prove title to re-enter otherwise than by a presumption under S. 110, Evidence Act. There is a conflict of authority on this question.

Before the Specific Relief Act, 1877, was enacted, the Calcutta High Court held to be the ordinary rule that force does not interrupt possession, and that he whose possession was interrupted by an act of violence, without any form of law or justice, was nevertheless to be considered as a possessor for the purposes of S. 110 aforesaid : *Jadubnath* v. *Ram Soondur* (1), or *Khaja Enaetoollah* v. *Kishen Soondur* (2), *Radha Bulla* v. *Kishen Gobind* (3), *Gour Paroy* v. *Wooma Soonduree* (4), *Mahomed Bux* v. *Abdool Kureem* (5) and *Daitari Mohanti* v. *Jugo Bundhoo* (6). In *Kawa Manji* v. *Khowaza Nussio* (7), the same tribunal held that civil Courts are competent, S. 15,

(1) [1867] 7 W. R. 174.
(2) [1867] 8 W. R. 386.
(3) [1868] 9 W. R. 71.
(4) [1869] 12 W. R. 472.
(5) [1873] 20 W. R. 458.
(6) 1875] 23 W. R. 293.
(7) [1880] 5 C. L. R. 278.

Act 14 of 1859, notwithstanding, to give a decree for immovable property on the bare ground of illegal dispossession in a suit brought after six months from the date of such dispossession, in which suit the defendant has failed to prove his own title to the land. But thereafter the Calcutta Court adopted the view that proof of prior possession, and of illegal dispossession, are in themselves no evidence of title, except in a possessory suit under Act 1 of 1877 ; and that S. 110, Evidence Act, applies only to actual and present possession, and does not declare generally that possession shall always be prima facie evidence of title : *Mohabeer Pershad* v. *Mohabeer Singh* (8), *Brojo Sunder* v. *Koilash Chunder* (9), *Purmeshur Chowdhry* v. *Brijolall Chowdhry* (10), *Nisa Chand Gaita* v. *Kanchiram Bagani* (11). These decisions are based, in some cases, upon deductions from the dicta of their Lordships of the Privy Council in *Wise* v. *Ameerunnissa Khatoon* (12), and in *Ismail Ariff* v. *Mahomed Ghouse* (13). But some disturbance of the view is indicated by the Full Bench decision in *Tamizuddin* v. *Ashrub Ali* (14).

The Bombay High Court, after some decisions the other way, have settled down to a contrary opinion, and do not accept the Calcutta interpretation of the above Privy Council ruling : *Pemraj* v. *Narayan* (15), *Krishnarav* v. *Vasudev* (16), *Krishnacharya* v. *Lingawa* (17), *Hanmantrao* v. *Secretary of State* (18), *Bharmawa* v. *Sangappa* (19), *Bai Fatan* v. *Emad Asla* (20) ; and *Rajaram* v. *Nanchand* (21). In the Madras High Court a some what uncertain note was sounded in *Mustapha Saheb* v. *Santha Pillai* (22), but the Bombay view is clearly followed in *Narayana Row* v. *Darmachar* (23). To the same effect is the dictum in *Lacho* v. *Har Sahai* (24), followed in *Wali Ahmad Khan* v. *Ajudhia Kandu* (25) and approved, as to principle, in *Sri Gopal* v. *Aisha Begum* (26). The same view was taken by Ismay, C.J., in *Nand Ram* v. *Narbad* (27).

I am of opinion that the correct view is that propounded by the majority of the Chartered High Courts and by this Court, and that S. 9, Specific Relief Act in no way controls the operation of S. 110. Evidence Act. That section provides that peaceful possession shall be prima facie proof of title : while S. 9, Act 1 of 1877, has no concern whatever with title, but is merely a law for restoring a possession which has been disturbed otherwise than in due course of law. The former will not avail a possessor against the true owner : the latter can properly be used to eject even a true owner who has disturbed a peaceful possession ; because, in a summary case, the Court will not look at title, but only consider the question whether there has been an unlawful—using that word to mean "otherwise than in due course of law"—disturbance of possession. In one of the Calcutta cases it was suggested that if S. 110, Evidence Act, were to be applied to a possession which had been disturbed, anomalies would arise. For example, suppose *A* having held peaceful possession for eight years is then forcibly ejected by *B*, but does not sue *B* for seven years after the ejectment. Could the presumption under S. 110 be properly used in favour of *A* ? Or, suppose the converse case, where *A*, having held for seven years, is unlawfully ejected by *B*, who holds for eight years before any suit is brought. Such cases seemed to the Calcutta Judges to create difficulties in applying the section to any but actual physical occupation at the date of suit. They would not apply it to any wider form of juridical possession. With due respect I venture to question this reasoning. It is not safe to interpret a provision of law by the result of applying it to an extreme case. The best rule that the ingenuity of man ever devised can be reduced to an absurdity in that way. It is easy to put forward an extreme case against the Calcutta interpretation. Suppose *A*, in peaceful pos-

(8) [1881] 7 Cal. 591=9 C. L. R. 164.
(9) [1882] 11 C. L. R. 133.
(10) [1890] 17 Cal. 256.
(11) [1899] 26 Cal. 579=3 C.W.N. 568.
(12) [1879-80] 7 I. A. 73 (P.C.).
(13) [1893] 20 Cal. 834=20 I. A. 90 (P.C.).
(14) [1904] 31 Cal. 647=8 C.W.N. 446.
(15) [1881-82] 6 Bom. 215.
(16) [1884] 8 Bom. 371.
(17) [1896] 20 Bom. 270.
(18) [1901] 25 Bom. 287=2 Bom. L. R. 1112.
(19) [1900] 2 Bom. L. R. 628.
(20) [1901] 3 Bom. L. R. 246.
(21) [1903] 5 Bom. L. R. 225.
(22) [1900] 23 Mad. 179.
(23) [1903] 26 Mad. 514=13 M.L.J. 146.
(24) [1890] 12 All. 46=(1888) A.W.N. 43.
(25) [1891] 13 All. 537=(1891) A.W.N. 196.
(26) [1907] 29 All. 52 = 3 A. L. J. 775=(1906) A. W. N. 264.
(27) [1899] 12 C. P. L. R. 59.

session of the house in which he dwells, leaves it physically unoccupied for a few hours, while he visits a friend. During his absence, *B* takes up his abode in the house, and claiming it as his own, forcibly and successfully prevents the re-entry of *A*. Thereupon *A* at once files a regular suit for possession. The Calcutta interpretation of S. 110, Evidence Act, would not only refuse the presumption thereunder to *A*, but would grant it to *B*. The correct rule seems to be that law must be reasonably interpreted and discreetly applied. The interpretation must be accurate, constant, and consistent ; and we must look to a proper exercise of judicial discretion for the elasticity necessary for the due application of that interpretation to the varying circumstances of each case as it comes up for treatment.

In the supposed anomaly illustrated by the Calcutta High Court, under a proper construction of S. 110 aforesaid, *B's* unlawful dispossession of *A* would not prevent a presumption in *A's* favour under the section. But a discreet Judge would at once hold that presumption rebutted by *A's* conduct in allowing *B* to remain in undisputed possession for the seven or eight years, as the case might be, provided *A's* ejectment was forcible or otherwise within his knowledge. But suppose, in the case used as an illustration, *B's* trespass was a clandestine encroachment only discovered by *A* after it had existed for seven or eight years, and immediately attacked by a suit. Surely, in such circumstances, proof that *A* was in juridical possession before *B* encroached would rightly give rise to a presumption in favour of *A's* title and against that of *B*. A man cannot be allowed to take advantage of his own wrong, as where he has obtained possession by illegal means, such as force or fraud, in order to shift the burden of proof on to his opponent. The possession which attracts the presumption of ownership is juridical possession, obtained *nec vi, nec clam, nec precario, ab adversario* : and it stands valid against all the word except the person legally entitled. It cannot, in the eye of the law, for the purpose of applying S. 110, Evidence Act, be interrupted by force or fraud. But where a possession, in whatever way it was originally obtained, has stood undisputed for such time as, in the circumstances of the case is sufficient to satisfy a reasonable mind that it must have some legal right or sanction behind it, the Court will treat it as a juridical possession to which the above section is applicable.

In the present case the plaintiff had such a juridical possession. The date and nature of its origin are unknown. But the Courts below were satisfied that, when forcibly disturbed by the defendant, it had continued undisputed for a sufficient time to justify the assumption that it was a legal and valid possession. That finding made it a possession for the purpose of applying S. 110, Evidence Act, and the defendant, having failed to prove his own title, cannot fall back on a jus tertii. The decrees of the Courts below are thus correct, and I therefore dismiss the present appeal without notice to the other side.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Nagpur 57

MITTRA, OFFG. A. J. C.

Gokal Singh—Plaintiff—Appellant.

v.

Kanhayalal—Defendant—Respondent.

First Appeal No. 64 of 1912, Decided on 25th June 1913, against decree of Dist. Judge, Hoshangabad, D/- 19th April 1912.

Decree—Setting aside—Proof—In suit for setting aside decree passed as against minor burden of proof is on person alleging majority.

Where a decree passed against a person as a minor is sought to be declared null and void on the ground that he was not minor but major at the date of the suit, the burden of proof lies on him to establish his allegation. [P 58 C 1]

S. R. Pandit—for Appellant.

Atmaram Bhagwant—for Respondent

Judgment.— The plaintiff-appellant sues for a declaration that the decree in Suit No. 9 of 1909 in the Court of the District Judge, Hoshangabad, is null and void as against him. His allegations are that whereas at the date of the former suit he was twenty-two years of age he was described in the plaint in that suit as a minor, and one Budhu Singh, his brother, appointed his guardian ad litem. The plaintiff says that he had no notice of the former litigation and only came to know of it when the property mortgaged was sold. The plaintiff's case is that he lives in the same house as Buddhu Singh, but is not joint in

estate with him since the last seven years. The defendants pleaded that the plaintiff was a minor in 1909. It is unnecessary to notice the other pleas taken in the lower Court. The suit has been dismissed on the ground that the plaintiff has failed to prove that he had attained majority in 1909.

The argument for the appellant was twofold. In the first place he contends that he has proved the plaintiff's age in 1909 to be 22. Secondly, he contends on the authority of *Cheyt Narain Singh* v. *Bunwaree Singh* (1) that it was for the defendant to establish that the plaintiff was a minor at the time of the former suit.

The plaintiff's two witnessess on the point of his age have been disbelieved by the lower Court. The defendants have adduced no evidence on this point. I agree with the learned District Judge that no reliance can be safely placed on the testimony of the plaintiff's two witnesses, and I need not repeat the reasons he has given in his judgment.

On the second point, I agree with the learned District Judge that the burden of proof lay on the plaintiff to establish the allegations made in his plaint. The case from the *Weekly Reporter* cited above is not in point. There the question was whether the plaintiff was a minor at the date of the suit. In this case we are concerned with the plaintiff's minority when a former suit against him was pending. Under O. 32, R. (3), the Court can only appoint a guardian for a defendant on being satisfied of the fact of his minority. From Ex. P-3, a copy of the order sheet in Suit No. 9 of 1909, I find that on the 17th April 1909 the Court held Gokal Singh (the present plaintiff) to be a minor and thereupon proceeded to appoint his elder brother Buddhu Singh as his guardian for the suit. On what materials the Court was satisfied of the plaintiff's minority I am unable to find from the record. I think it is for the plaintiff to show that though the former Court was satisfied that he was a minor he was really not so. The defendants may well rely on the order of the Court in the absence of satisfactory proof by the plaintiff showing that the order was erroneous. The case is somewhat analogous to a case where a defendant, against whom an ex parte decree has been passed, seeks to set aside that decree on the ground that the summons was not duly served on him. In such a case the burden will be on the defendant to prove nonservice of summons, as held in *Torob Ali* v. *Chooramun Singh Chowdhry* (2). The appeal fails and is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

(1) [1875] 23 W. R. 395.

(2) [1876] 24 W. R. 262.

A. I. R. 1914 Nagpur 58

HALLIFAX, A. J. C.

Kekra and *another*—Defendants— Appellants.

v.

Sadhu—Plaintiff—Respondent.

Second Appeal No. 229 of 1913, Decided on 20th November 1913, against decree of Divisional Judge, Chhattisgarh Division, D/- 23rd January 1913.

(a) Civil P. C. (5 of 1908), S. 105—Scope of S. 105—Findings forming basis of appealable order but not appealed from become res judicata.

Section 105 is only one of the many rules that come under the heading of res judicata. If an order is passed against which an appeal is allowed but no appeal is lodged in time, that order is binding and also all the findings and decisions which form an essential part of the basis of that order, but not those which are only incidental thereto. S. 105 (1) sets out a group of exceptions to this rule and S. 105 (2) states one exception to that group of exceptions bringing that particular case back under the primary rule. [P 59 C 2, P 60, C 1]

(b) Interpretation of Statutes—Word bears same meaning.

It is an ordinary canon of interpretation that a word keeps the same meaning at least throughout any one Act. [P 60 C 1]

M. B. Dadabhoy—for Appellants.

Bipin Krishna Bose—for Respondent.

Judgment.—One Mukhiram with his son Sakharam and his brother Raghunath executed a mortgage in 1895 in favour of Mohanlal and Piarelal, the first two defendants in the suit out of which this appeal arises. They sued on the mortgage in 1899 impleading all the original mortgagors but omitting to implead Sadhu and Kanhai, two younger sons of Mukhiram, who were not parties to the mortgage, being not more than ten and three years of age respectively when it was executed. A decree for foreclosure was given in that suit and the mortgagees subsequently obtained possession of the property. In July 1909 Sadhu and Kanhai, the two sons of Mukhiram who were not joined in the mortgage suit, instituted the suit out of which this

appeal has arisen, claiming a right to redeem the property from the mortgagees and their transferees, Kekra and Bisnath. These transferees, who are defendants 3 and 4, are the only defendants who really contested the claim. They are the appellants in this Court.

In the first Court it was found that the mortgagees had no notice at the time they filed their suit for foreclosure of the interest of the plaintiffs in the property, and the suit was dismissed in June 1910. The plaintiffs appealed to the Court of the Divisional Judge, who held that the mortgagees had constructive notice of the plaintiff's existence and interest in the property and that even without such notice the plaintiffs still had a right to redeem solely on the ground that they were not parties to the foreclosure suit. The case was therefore remanded to the first Court in January 1911 for trial of the remaining issues that arose in the case, and in Juue 1911 that Court issued a preliminary decree for redemption on payment of Rs. 3,120-13-4. The two contesting defendants appealed, and the case was again remanded in September 1911 for a proper calculation of the price of redemption, the finding that the plaintiffs had a right to redeem being discussed and re-affirmed in the order of remand. The first Court then, on 31st August 1912, gave a decree fixing the price of redemption at Rs. 5,981-4-3. The plaintiffs appealed again solely in respect of the amount payable. which was reduced to Rs. 3,600 by a judgment of the Court of the Divisional Judge delivered on 23rd January 1912.

This second appeal is against that judgment and decree and the appellants are Kekra and Bisnath who are in possession of the property as purchasers from the original mortgagees. A great part of the appeal is taken up with the contention that the price of redemption should be what is found to be due on the mortgage, without any reference to the price paid for the property by the appellants to the mortgagees, which is the basis taken by the lower appellate Court. This as an abstract proposition is admittedly quite sound. But the ground taken is abandoned on the learned counsel for the appellants realizing that on a proper examination of the mortgage accounts, which must include consideration of the profits received by them, they would be found entitled to less than the sum that has been fixed in the lower appellate Court.

The substance of the appeal is however an effort to avoid the decision that the plaintiffs had any right of redemption and were not bound by the foreclosure decree passed against their father Mukhiram. If that plea is still open to the appellants and they are not debarred from taking it by the Divisional Judge's judgment of January 1911, it is bound to succeed, according to the unquestionably sound view of the law enunciated by Batten, A. J. C., in *Gore* v. *Kashi Ram* (1). But that judgment was delivered in October 1912 and published in February 1913, and till then the accepted view of the law in these provinces was that taken by the Divisional Judge in his two orders of remand in January and September 1911. But, right or wrong, the appellants are bound by that decision unless it is still open to them to appeal against it, and it seems clear that they are precluded from doing this by the provisions of S. 105 (2), Civil P. C.

Their learned counsel urges that by the words of S. 105 (2) he is precluded from questioning only the "correctness" of the order of remand itself, that is to say, he cannot now say that the case ought not to have been remanded and that all the proceedings following the remand ought to be left out of consideration, but he can say that any incidental findings or decisions in the order of remand are wrong. But in this case the order of remand is based solely and entirely on the decision that the plaintiffs still had the right to redeem. If the opposite view had been taken there could not possibly have been any remand. To question the correctness of this decision is therefore nothing more or less than questioning the correctness of the order of remand.

Section 105, Civil P. C. is only one of the many rules that come under the heading of res judicata. If an order is passed against which an appeal is allowed and you do not appeal in time that order is binding upon you and also all the findings and decisions which form an essential part of the basis of that order. S. 105 (1) sets out a group of exceptions to that rule, and S. 105 (2)

(1) [1913] 9 N. L. R. 1=18 I. C. 848.

states one exception to that group of exceptions, bringing that particular case back under the primary rnle. We have then to apply, in that specified case, the ordinary principles of the rule of res judicata; and one of the main principles, as I have already said, is that when an order has become final and binding upon you, you can still question all those incidental findings and decisions which do not form an essential part of the basis of the order, but not those which do. Here the decision that the plaintiffs still had a right to redeem was not only an essential part of the basis of the order of remand of January 1911 but was the whole of it.

If there could be any doubt on this point it would be set at rest by the fact that the word "correctness" is also used in S. 97, Civil P. C. It is admitted that by the use of that word S. 97 precludes the questioning of all material decisions in the judgment equally with the questioning of the decree itself, and it is an ordinary canon of interpretation that a word keeps the same meaning at least throughout any one Act. The appeal is for these reasons dismissed, and the appellants must pay the costs of the respondents.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Nagpur 60

STANYON, A. J. C.

Raghu—Plaintiff—Applicant.

v.

Madhgia—Defendant—Respondent.

Civil Revn. Appln. No. 175 of 1913, Decided on 26th March 1914, against decree of Dist. Judge, Bhandara, D/ 30th April 1913.

Limitation Act (9 of 1908), S. 12—Time requisite for copies how to be calculated pointed out—Duties of person applying for copies pointed out—Principal cannot get credit for agent's laches—Rules are mandatory—Application for copies must be accompanied with costs—Costs received late owing to delay in post office—Application deemed presented when money reached office—Time taken by post office for reaching application and money and copies back to applicant would not be excluded.

The time requisite for obtaining copies must be measured from the date when an application for such copies is duly presented by and the date on which such copies are duly tendered for delivery to the applicant. [P 61 C 2]

The time requisite for obtaining a copy is the time which it takes an applicant to obtain the copy using all due diligence. He must: (1) present an application, accompanied by the prescribed fee at a proper time and place to the appointed official; and (2) be prepared to take delivery of the copies at the time and place fixed for delivery. If he does not discharge both these duties he fails to exercise the due diligence required to obtain the copies. But he may do these acts personally or by an agent. [P 61 C 2, P 62 C 1]

Where however he elects to work through an agent, he cannot claim credit for any delay caused by taking that course. The time allowed for obtaining copies through an agent is the same as would have been allowed if the applicant had himself applied for and taken delivery of them, irrespective of the question whether the agent's delay was or was not beyond the control of the principal. A principal who elects to use an agent in working against strict rules of time does so at his own risk. [P 62 C 1]

The computation of time for obtaining copies of judicial records is subject to strict rules and no discretionary extensions of such time are permissible. [P 62 C 1]

A suit was dismissed on 30th November 1912. On 14th December 1912 the plaintiff posted an application for copies of judgment and decree, and on the same day despatched a money order to pay the cost thereof. The application reached the hands of the Clerk of the Court on 16th December 1912, but the money order which reched the delivery post office on 18th December could not be delivered to the Clerk of the Court before 21st December, because 18th, 19th and 20th December being public holidays, the copying office was closed during those days. The copies were ready and were posted to the applicant on 20th January 1913.

Held: in computing the period of limitation for an appeal against the decree, that:

(1) the application for copies was not prese n ted until 21st December 1912;

(2) the post office being an agent of the applicant, the time to which the applicant was entitled should be measured from the date when the post office delivered the application and the necessary money to the official appointed to receive the same, and the day on which the official appointed to deliver the copies made such delivery to the post office;

(3) all time occupied by the post office in conveying the application and fees to the copying office, and in carrying back the copies to the applicant was outside that computation;

(4) the tender of fees transmitted by money order on a public holiday was not a tender at the proper time. [P 62 C 1 2]

A. M. Moodlyar—for Applicant.

Judgment.—The facts of this case are not disputed. The plaintiff sued the defendants for Rs. 172-13-0 in the Court of the Munsif of Sakoli, and the suit was dismissed on 30th November 1912. On 14th December 1912 the plaintiff posted an application for copies of the judgment and decree, and on the same day dispatched a money order to pay the costs thereof. The application reached the hands of the Clerk of the Court on 16th

December 1912. The money order is said to have reached the delivery post office on 18th December, but 18th, 19th and 20th December being holidays, during which the copying office was closed, payment of the money order was made to the Clerk of the Court on 21st December 1912. The copies were ready and were posted to the applicant on 20th January 1913, and he filed an appeal from the Munsif's decree on 31st January 1913 in the Court of the District Judge. That Court, allowing from 21st December 1912 to 20th January 1913 as the time requisite for obtaining "copies," found the appeal to have been filed one day too late and dismissed it as time barred. The plaintiff has therefore made the present application for revision.

I will assume for the sake of argument that the decision of this Court in *Duri* v. *Mohanlal* (1) does not stand in the way of my consideration of the present application on the merits thereof. Circular No. V—8 of this Court contains the rules regulating the grant of copies of civil judicial records. R. 3 thereof reads:

"Every application shall be accompanied by an advance sufficient to cover the estimated cost of the copy applied for. In the case of an application sent by post the advance shall be remitted by money order. An application unaccompanied by an advance shall not be registered or acted on."

This rule follows the general principle laid down in S. 6, Court-fees Act, 1870, and no application for copies can be taken to have been duly presented unless and until the prescribed advance which should be tendered with it has been received. Therefore I concur with the learned District Judge in holding that the application for copies in this case was not presented until 21st December 1912. Two circumstances are however urged in support of the applicant's contention that due presentation should be taken to have been made on an earlier date. Firstly, it is said that the application and the money order having been dispatched by the applicant on the same day, 14th December 1912, the failure of the money order to reach the Clerk of the Court on 19th December, when the application was put into his hand, was a result beyond the control of the applicant and should not be debited to him. On this ground it is claimed that the money order should be deemed to have been delivered on the date when in ordinary course it should have been delivered, and due presentation of the application should be held to have been made on 16th December 1912. Secondly, it is said that the money payable under the order was in fact tendered by the post office to the Clerk of the Court on 18th December 1912, but was not received owing to the Court and its offices being closed on that day—one of the three public holidays already mentioned. On this ground it is claimed that presentation of the application for copies became complete on 18th December 1912.

I am of opinion that neither of these contentions can be accepted. A study of the case law on the subject seems to me to show that the time requisite for obtaining copies must be measured from the date when an application for such copies is duly presented by and the date on which such copies are duly tendered for delivery to the applicant. The authorities I have considered are *Upasoo* v. *Gopala* (2); *Mt. Kaveri Bai* v. *Mt. Chandra Bhagabai* (3); *Punjaji* v. *Jagannath* (4); *Garud* v. *Hira Ram* (5); *Parashram* v. *Likhan* (6); *Krishna* v. *Balia* (7); *Paga* v. *Sadasheo* (8); *Bechi* v. *Ahsanullath Khan* (9); *Yamaji* v. *Antaji* (10); *Nobin Chunder Roy* v. *Brojendro Coomar Roy* (11), and my own unreported judgment in *Pandurang* v. *Balaji*(12), decided on 7th November 1911. The view laid down in *Punjaji* v. *Jagannath* (4), that the time requisite for obtaining a copy is the time which it takes an applicant to obtain the copy using all due diligence, was approved in *Krishna* v. *Balia* (7): and I concur in it. In order to obtain copies of a civil Court judgment and decree the applicant must perform two acts, namely:

(1) he must present an application accompanied by the prescribed fees at a proper time and place to the appointed official; and

(1) [1891] 4 C. P. L. R. 184.

(2) [1891] 4 C. P. L. R. 166.
(3) [1891] 4 C. P. L. R. 188.
(4) [1893] 6 C. P. L. R. 13.
(5) [1901] 14 C. P. L. R. 40.
(6) [1911] 7 N. L. R. 67=10 I. C. 866.
(7) [1912] 8 N. L. R. 11=14 I. C. 403.
(8) [1912] 8 N. L. R. 172=17 I. C. 624.
(9) [1890] 12 All. 461=(1890) A.W.N. 149.
(10) [1899] 23 Bom. 442.

(2) he must be prepared to take delivery of the copies at the time and place fixed for delivery.

Unless the applicant discharges both these duties he fails to exercise, the due diligence required to obtain the copies. But he may do these acts personally or by an agent duly empowered. Where however he elects to work through an agent, he cannot claim credit for any delay caused by taking that course. He cannot include,as time requisite for obtaining the copies any period occupied in sending his application or instructions to the agent, or by the agent in proceeding to the copying office and presenting the application or in the transmission of the copies by the agent to him. In other words, the time allowed for copies obtained through an agent will be the same as would have been allowed if the principal had himself applied for and taken delivery of them, namely, from the date when the application is duly presented to the date when the copies are duly tendered for delivery; and this will be so irrespective of the question whether or not the agent's delay was or was not beyond the control of the principal. A principal who elects to use an agent in working against strict rules of time does so at his risk. The computation of time is subject to strict rules, and must not be confused with cases where for sufficient cause an extension of time is allowable, There is no rule for discretionary extensions of time in computing the time requisite for obtaining copies of judicial records. This was pointed out in the Allahabad case above quoted.

One of the agents whom an applicant for such copies may employ is the post office; and the time which he will be entitled to in such a case will be measured from the date when the post office has delivered the application and the necessary money to the official appointed to receive the same and the day on which the official appointed to deliver the copies makes such delivery to the post office. All time occupied by the post office in conveying the application and fees to the copying office and in carrying back the copies to the applicant is outside that computation. I took this view in *Pandurang* v. *Balaji* (12) and I see no reason to modify it in any way. Abnormal and unexpected failures of the post offiee, like such failures on the part of any other agent—failures for which the applicant is in no way responsible—may be sufficient ground for extending;time in cases where time may be extended but they cannot affect the computation of time.

In the present case the application was not duly presented until the advance fees were paid in by the post office. It is notorious that a money order takes a longer time than a plain unregistered letter to reach the addressee, and there is no ground for assuming that there was anything unusual in the money order not being paid on 16th December 1912: while any tender of the fees transmitted by the money order on a public holiday was not a tender at the proper time for the purpose of payment under the rule above cited.

For these reasons I hold that the District Court rightly held the applicant's appeal to have been filed one day beyond time. The exercise of its discretion in not extending time is not open to consideration in revision. This application is therefore dismissed without notice to the other side.

P.N./R.K. *Application dismissed.*

(11) [1899] 12 C. L. R. 541.
(12) S. A. No. 75-B of 1911.

A. I. R. 1914 Nagpur 62

MITTRA, OFFG. A. J. C.

Miya Saheb—Defendant—Appellant.

v.

Champa Lal—Plaintiff—Respondent.

Second Appeal No. 269 of 1912, Decided on 1st August 1913, against decree of Dist. Judge, Nimar, D/- 20th January 1912.

(a) C. P. Tenancy Act (11 of 1898), S. 46—Mortgage prior to Act— Sale decree cannot be passed against occupancy rights.

Under S. 46 no sale decree in respect of occupancy rights can be passed on an unregistered mortgage, even if the deed was executed before the Act came into force. [P 63 C 2]

(b) Interpretation of Statutes—Statute clear —Even vested rights can be divested.

Where the language of the statute is clear and unambiguous, Courts have to give effect to it whether it has the effect of divesting a vested right or not. [P 63 C 1, 2]

Atmaram Bhagwant—for Appellant.

S. R. Pandit—for Respondent.

Judgment.—The plaintiff sued upon an unregistered mortage executed on 19th September 1898. The sole defence taken was a denial of execution. Both the

Courts below have found the mortgage to have been duly executed. An attempt was made to question this finding, but the finding being purely one of fact is binding on me.

A new point however, has been raised in this Court, viz., that the decree of the lower Court so far as it directs sale of land held in occupancy right contravenes the provisions of S. 46, Tenancy Act, (11 of 1898), which came into force on 21st October 1898. The respondent objects to this point being allowed to be raised. In this case neither the plaint nor the decree mentions the right in which the fields are held. In the mortgage they are described as occupancy fields. If, as I shall show later, the legislature forbids the sale of certain kinds of property, it will be the duty of this Court to see that there is no evasion of the law by improperly omitting from the plaint the tenure under which the fields are held. The decree passed in this case is contrary to the instructions given by this Court in Civil Circular No. 5, para. 3, Part 1. In my opinion the plaintiff should be asked to state the nature of the right in which the fields are held, especially as his mortgage prima face shows the fields are unsaleable.

The next point for decision is whether S. 46, Tenancy Act, has retrospective effect. At the date of the mortgage occupancy rights were transferable with the consent of the landlord. The mortgage was for a sum under one hundred rupees and did not require ragistration. But for the provisions of S. 46 (2), the plaintiffs would have been entitled to a sale decree.

I note that S. 46 (3) relates to transfer made after the commencement of the Act for it says that "no occupancy tenant shall be entitled to sell, make a gift of, mortgage. . . . his right in his holding." The question then whether such a transfer made after Act 11, 1898, can be avoided in a civil Court of or by an application to a revenue officer, does not arise in this case.

It remains for me to decide whether sub-Cl. (2), S. 46, applies. It is argued that the legislature did not intend to invalidate a contract valid at the time it was entered into. This is no doubt the ordinary presumption, but where the language of the statute is clear and unambiguous, Courts have to give effect to it whether it has the effect of divesting a vested right or not. Now S. 46 (2) says: "Save in pursuance of a document duly registered before the commencement of this Act, no decree or order shall be passed for the sale of the right of an occupancy tenant in his holding, nor shall such right be sold in execution of any decree or order." It appears to me that the sale of occupancy right is prohibited and the only exception made is in favour of a person holding a registered instrument. It will be seen that no provision is made prohibiting a foreclosure decree being passed, whether on a registered or unregistered instrument. But it is clear that no sale decree can be passed on an unregistered mortgage. What other remedies the plaintiff has on his mortgage it is premature for me to decide.

The Court of first instance will call upon the plaintiff to amend his plaint by describing the right in which the fields are held by the mortgagor. It will be in the discretion of the first Court to allow any further amendment of the plaint that may be applied for by the plaintiff.

I reverse the decrees of both Courts and direct the first Court to try the suit with reference to the above remarks. There will be no order for refund of court-fees. The appellant will pay the costs hitherto incurred in all three Courts.

P.N./R.K. *Decrees reversed.*

A. I. R. 1914 Nagpur 63

HALLIFAX, A. J. C.

Jairam—Plaintiff—Appellant.

v.

Sunderlal and *others* — Defendants — Respondents.

Second Appeal No. 98 of 1913, Decided on 29th June 1914, against decree of Divisional Judge, Nerbudda Divn. D/- 4th November 1912.

Occupancy holding — Transfer of, without landlord's consent is voidable.

A transfer of an occupancy holding is voidable at the instance of the landlord unless he consented to the transfer at the time it was made or subsequently. This rule was merely affirmed in the Central Provinces Tenancy Act 9 of 1883. [P 65 C 2]

J. C. Ghosh—for Appellant.

B. K. Bose—for Respondents.

Judgment.—The appellant was plaintiff in the first Court and the respondents were the only contesting defendants. The former represents in this case Nandiram

and Gopiram Sunars as the mortgagees of a half share in an occupancy holding in the village of Kamath. The mortgage was executed in 1878. The respondents represent one Gulab Khan who held a mortgage of the entire holding executed in 1875. In 1906 he obtained a decree for foreclosure on this mortgage in a suit to which the subsequent mortgagees were not parties. This decree he transferred to the respondents, who obtained possession of the holding. The respondents are also now proprietors of the whole village of Kamath. (The contention put forward in ground 5 of the appeal that there were other sharers was withdrawn). The appellant sued to redeem the respondents' prior mortgage and to enforce his own. The reply of the respondents, or so much of it as concerns us now, was that the malguzar of the village in 1878 and his successors never consented to the appellant's mortgage, which cannot be enforced against them as they are now the malguzars. The mortgage of 1875 which they hold they can themselves, of course, ratify now, even if they had not done so when they bought the decree based on it.

In both the Courts below it has been found that the appellant's mortgage of 1878 never received the landlord's consent or ratification. In the first Court, that of the District Judge of Betul, it seems to have been tacitly admitted that a mortgage of an occupancy holding executed before 1st January 1884, when Act 9 of 1883 (Central Prov. Ten. Act), came into force, could not be enforced against the landlord and was voidable at his option, unless it had been executed with his consent or subsequently ratified by him. In appeal the plaintiff withdrew his tacit admission and contended that mortgages of occupancy holdings did not before 1884 require the consent of the malguzar to make them good against him. The learned Divisional Judge held that "all such transfers effected before Act 9 of 1883 came into force are governed by the Wajibularz," quoting as authority *Nathu Lalla* v. *Vithoba* (1) ; *Dallu Patel* v. *Madho Patel* (2) and a third case wrongly entered as reported in 1 *C. P. L. R.* 152 of which the names of the parties are not given. He further held on the authority of *Nathu Lalla* v. *Vithoba* (1) that in this case "the occupancy right was not transferable without the landlord's consent according to the Wajibularz."

The plaintiff contends now that his mortgage is valid against the malguzar though it was without his consent, and further that in finding that the consent of the former malguzar, Gadi Patel, has not been proved, the Divisional Judge has examined only one of the two pieces of evidence on the record and has left the other and more important item out of consideration entirely. I take the second point first. The learned Divisional Judge points out that the only witness on the question of consent, Ganpat Rao (P. W. 2), the son of Gadi Patel alias Vithal Rao, does not try to prove more than that his father accepted rent from the plaintiff in the capacity of mortgagee in possession, but no receipts were produced showing that the rent was accepted from the mortgagee in that capacity. He has certainly overlooked the deposition of Gadi Patel himself made on 17th September 1906, of which copies were filed by both parties (Exs. P-4 and D-9). He said : "I have seen Gulab Khan cultivate the entire fields for the 10 years about 20 years ago. For the last 20 years he has not been cultivating any part of the field." In cross-examination he said : "I realized entire rents from the plaintiff, Gulab Khan, for those 10 years. (Shown 10 receipts P-5 to P-15). These are receipts granted by me. They are for half the land. The receipts for the other half may be in Gopiram's name." It would be more than absurd to suggest that this last sentence was evidence tending to show that Gadi Patel ever treated Gopiram as mortgagee in possession and accepted the rent from him in that capacity. The whole of the evidence bearing on the question of the ratification by Gadi Patel of the mortgage has therefore been examined in the lower appellate Court and the finding of that Court that he never ratified it, is conclusive.

The rulings of this Court in *Nathu Lalla* v. *Vithoba* (1) and *Dallu Patel* v. *Madho Patel* (2) refer only to absolute occupancy holdings. The absolute occupancy right was a creation of the first settlement, as was explained by Bose, A. J. C., in *Ragho* v. *Sadoo* (3), and the in-

(1) [1888] 1 C.P.L.R. 9.
(2) [1890] 3 C.P.L.R. 158.
(3) [1910] 6 N.L.R. 6=5 I.C. 428.

cidents of that right are regulated by the provisions of the Wajibularz. But that a transfer of an occupancy right is not governed by the Wajibularz is distinctly laid down in the first of the two rulings mentioned in the judgment of the lower appellate Court as authority for the contrary view. And if the Wajibularz did govern this case, it would be impossible for the ruling in *Nathu Lalla* v. *Vithoba* (1), the report of which does not say from what district the case came, to lay down that in this case from the Betul District "the occupancy right was not transferable without the landlord's consent according to the Wajibularz." In the absence of all evidence to the contrary, we must presume that there is no record in the Wajibularz of the district with which we are concerned of any such limitation of the right of transfer, and I have ascertained that this is the case by reference to the officially published translations of specimen forms of Wajibularz adopted at the settlement of 1863—76.

The rights of an occupancy tenant are to be found in custom and the statutes, which will between them show what the essential nature of that tenure is. Of custom we have no record in the Wajibularz or elsewhere in this case. The law on the subject is to be found in S. 6 of Act 10 of 1859. There is a long series of rulings of the Calcutta High Court on the question whether the tenure conferred and defined by this section could or could not be transferred without the consent of the landlord. The majority of them favour the view that a transfer under that section would not be valid against the landlord unless it had consent or subsequent ratification, and this view was finally adopted by a Full Bench of the Court consisting of Couch, C. J,, and Jackson, Phear, Ainslie and Morris, JJ., in 1874 in *Narendra Narayan Roy* v. *Ishan Chandra Sen* (4). Their Lordships ruled, on reasoning which is absolutely convincing, that the right of an occupancy tenant in his holding is what was subsequently described in the Transfer of Property Act of 1882 as "an interest in property restricted in its enjoyment to the owner personally," which would make it an exception to the rule of common law that all forms of property may be transferred by the holder. This view of the matter was consistently taken by this Court in the cases mentioned in the Columnar Digest of Rulings bearing the numbers 107 (decided in 1876) and 186, 196, 198, 199, 200, 201 and 202 (decided in 1877).

I agree therefore in holding that even before 1884 an occupancy tenant had no right in his holding which he was authorized to transfer. If he made such a transfer he himself would not be allowed in equity to avoid it, and if the landlord consented to it or subsequently ratified it he would be under the same estoppel. What the rule comes to then is that a transfer of an occupancy holding is voidable at the instance of the landlord, unless he consented to the transfer at the time it was made or subsequently, and this rule was merely affirmed in the Tenancy Act of 1883. The appeal is dismissed and the appellant must pay all the costs.

P.N./R.K. *Appeal dismissed.*

(4) [1874] 22 W. R. 22=13 B. L. R. 274 (F. B.)

A. I. R. 1914 Nagpur 65

HALLIFAX, A. J. C.

Ganpatrao and *others*—Plaintiffs—Appellants.

v.

Jangia—Defendant—Respondent.

Second Appeal No. 312 of 1913, Decided on 12th January 1914, from decree of Dist. Judge, Betul, D/- 20th February 1913.

Limitation Act (9 of 1908), Art. 109—Actual receipt of profits is starting point.

Under the present law in a suit for mesne profits it is the actual receipt of the profits that gives the starting point for limitation: 10 *W. R.* 486; 22 *W. R.* 126; 24 *Cal.* 413 and 32 *Cal.* 118, *Ref.* [P 66 C 1]

S. Y. Deshmukh—for Appellants.

A. J. Balam—for Respondent.

Judgment—On 4th April 1909, the plaintiffs recovered possession of agricultural land which till that date was wrongfully held by the defendant. On 29th of April 1912 they instituted the suit out of which this appeal arises claiming the mesne profits obtained by the defendant from the land in the course of the agricultural year which ended on 31st of May 1909, and they stated that their cause of action arose on that date. The second crop of that year was cut on 24th March 1909, and the cutting of the first crop was of course still further outside the period of three

years ending on the date on which the plaint was filed. It has been held in both the Courts below that the suit is barred by time, as the three years allowed by Art. 109, Lim. Act, began to run from the various dates on which the crops were cut, which are the dates on which the defendants received the profits.

It is urged for the appellants that the period of limitation should be reckoned from the last day of the agricultural year, that is to say 31st of May 1909, and the cases of *Byjnath Pershad* v. *Badhoo Singh* (1) and *Thakoor Doss Roy* v. *Nobin Kristo* (2) are quoted in support of this contention. It was undoubtedly held by the Calcutta High Court in those cases that where the amount of mesne profits could not be ascertained until the end of the year, the cause of action did not arise till the end of that year. But those cases were decided under the old Limitation. Act (14 of 1859) and have been distinguished on that ground in the later rulings of the same Court in *Abbas* v. *Fassih-ud-din* (3) and *G. S. Hays* v. *Padmanand Singh* (4). Under the present law it is beyond doubt that it is the actual receipt of the profits that gives the starting point for limitation, and the cutting of the crops in March 1909 by the defendant was clearly a receiving of a portion of the profits. In any case it has to be admitted that he received no profits after 4th of April 1909, the date on which the plaintiffs recovered possession of the land. The suit, having been instituted on 29th of April 1912, is therefore too late, and this appeal must be dismissed. The appellants must pay all the costs.

P.N./R.K. *Appeal dismissed.*

(1) [1868] 10 W. R. 486.
(2) [1874] 22 W. R. 126.
(3) [1897] 24 Cal. 413.
(4) [1905] 32 Cal. 118.

A. I. R. 1914 Nagpur 66

MITTRA, OFFG. A. J. C.

Jamna Das — Defendant 2—Appellant.

v.

Paiku and *another*—Defendant 1 and Plaintiff—Respondents.

Second Appeal No. 280-B of 1912, Decided on 17th September 1913, from decree of Addl. Dist. Judge, Amraoti, D/- 5th March 1912.

Waste Land Rules (1876) — Permanent lease—To secure premium —Mortgage to ijaradar for limited term—On expiry of term village becoming khalsa and mortgagor declared occupant of survey number—Subsequent mortgage by him—Ijaradar's mortgage held enforceable against subsequent mortgagee also.

In order to secure the premium of a permanent lease, defendant 1 executed in favour of the plaintiff, a registered mortgage deed of his right in a field, and an ijaradar on the village becoming khalsa on the expiry of the mortgagee ijaradar's term the defendant-mortgagor was recorded as the occupant of a survey number. Subsequently he mortgaged his right to defendant 2 :

Held : that the mortgagor's title as a permanent tenant under the plaintiff did not come to an end on the village becoming khalsa and that as he did not acquire a new, independent title unconnected with his title under the plaintiff, the plaintiff's mortgage was enforceable as against the subsequent mortgagee.

[P 66 C 2]

G. V. Deshmukh—for Appellant.

M. R. Dixit—for Respondents.

Judgment. — The plaintiff Jagoba was an ijaradar of Mauza Khorad Khurd in the District of Yeotmal under the Waste Land Rules, 1876. Paiku, defendant 1 in this suit, entered into a transaction which has been described as a sale of field No. 15. This is obviously a misdescription, for Paiku appears to have agreed to pay Rs. 6, as the annual rent for the field. The sale deed is not on the record. The consideration for this transaction was Rs. 250. If the transaction were a sale, it would be the price, but if, as I hold it to be, a permanent lease, it was only a premium. To secure payment of this sum of Rs. 250 an unregistered mortgage deed of Paiku's right in the field was executed. Subsequently, on 27th August 1904, a registered mortgage was given in favour of the plaintiff. The ijaradar had only a limited term of years which expired, it seems, on 31st March 1905. Under the rules Jagoba became a Patel of the village. Paiku was recorded as the occupant of a survey number on the village becoming khalsa. On 30th March 1907, Paiku mortgaged his rights to defendant 2, now appellant before me. The sole question raised before me is whether the mortgage in favour of Jagoba, the plaintiff, is enforceable as against the subsequent mortgagee. Ordinarily this would be the case. The point for decision is whether the title of Paiku as a permanent tenant under Jagoba came to an end and whether on the village becoming

khalsa Paiku acquired a new and independent title unconnected with his original title under Jagoba.

The Transfer of Property Act was not applicable to Berar in 1904. The lower appellate Court has rightly pointed out that S. 43, T. P. Act, has therefore no application to this case. It does not by any means follow that the principle of law underlying the section cannot be applied as a rule of equity, justice and good conscience. I am not able to agree with the learned Judge in the lower appellate Court that S. 18, Specific Relief Act, has any bearing on the case. That section obviously refers to contracts to be specifically enforced. This is not a case for specific performance of a contract. We are dealing here with a conveyance under a registered instrument by way of a mortgage. Cases have been cited in the lower Courts without a clear comprehension of the principles laid down therein. For example, the case of *Jagannath* v. *Dibbo* (1) is merely an illustration of the well-known principle that a mere spes successionis is not the subject-matter of a transfer operating in praesenti, whatever equities may arise out of such a transaction. The case of *Gangabai* v. *Baswant* (2) is one of sale of property inalienable at the time of the sale. In this case, the ijaradar had a fixed term of years, but he was to be made at least patel of the village on the expiry of the term. But it seems to me that the tenancy which he created during his term could not be altogether ignored by the Government. R. 5 of the Waste Land Rules of 1876 says " that the lessee will make his own arrangements with his tenants during the period of his lease. * * * His tenants will hold on terms mutually agreed on and will enjoy such rights and privileges as they may be entitled to under the laws and rules in force." The arrangements to be made are not stated to be for the period of the lease, but during the period of the lease.

The rules do not contemplate ejectment of existing tenants who have brought waste land under cultivation, provided they are willing to pay the Government assessment. This liability to pay a possibly higher rent does not make Paiku's tenure a new and independent tenure not arising out of his original tenure. In the absence of an express rule declaring the determination of all existing tenancies, it must be held that Paiku had a legal right to be recognized as an occupant of a survey number on the expiry of Jagoba's lease, provided he accepted the Government assessment to be fixed by competent authority. During the ijara period, the ijaradar represented the Government, just as a thekadar represents the malguzar in the Central Provinces. The power to create a tenancy is presumed, in the absence of a stipulation to the contrary, in the lease or theka. This power is expressly given by R. 5 above quoted to the ijaradar. On the termination of the theka the malguzar cannot treat a tenant put into possession by the thekadar as a trespasser, if it was within the scope of his authority to create a tenancy. When the Government steps back into the shoes of the ijaradar on the expiry of the ijara, the Government is not empowered by the rules to treat the existing tenants as trespassers. The possibility of enlargement or curtailment of existing rights does not make the tenancy a new tenancy so as to extinguish all encumbrances on it.

The Bombay case quoted has no application as Paiku's rights during the izara, as granted to him by the ijaradar, were alienable. The case of *Gaya Din* v. *Kashi Gir* (3) is one where the property was not vested in the transferor at the time of the transfer. The present case is analogous to that of renewable leaseholds, and in such cases it has been held that " if the mortgagor renew, although not in accordance with the covenant to renew, the new lease will be held to be a graft on the old one, and subject in equity to the same mortgage as affected the old lease." Robbin's Law of Mortgage, Edn. 1897, p. 165.

Applying the above principle to this case, the mortgage was valid in its inception. It did not come to an end in 1905. It fastened itself on Paiku's right as an occupant of a survey. number. It is therefore enforceable against the appellant.

The appeal is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

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(1) [1909] 31 All. 53=1 I. C. 818.
(2) [1910] 34 Bom. 175=5 I. C. 866.
(3) [1907] 29 All. 163 =4 A. L. J. 57 = (1907) A. W. N. 7.

A. I. R. 1914 Nagpur 68 (1)

BATTEN, A. J. C.

Nanheylal—Applicant.

v.

Mt. Ranibahu—Opposite Party.

Criminal Revn. No. 149 of 1913, Decided on 11th September 1913, against order of Sub-Divl. Magistrate, Saugor, D/- 27th February 1913.

Criminal P. C. (5 of 1898), S. 250—Order of compensation cannot be made subsequently while discharging other co-accused—Irregularity cannot be cured by Criminal P. C. (5 of 1898), S. 537.

A Magistrate discharged an accused and ordered payment of compensation to him, under S. 250 at a later stage when another co-accused against whom a charge had been framed was acquitted :

Held : that the order awarding compensation was without jurisdiction as it was not contained in the order of discharge.

Held also : that this was not a mere irregularity which would be covered by S. 537, Criminal P. C. [P 68 C 1]

G. L. Subhedar—for Applicant.

Judgment.—In this case the Magistrate in a summary trial discharged accused 2 and 3 by an order recorded in the order sheet on 29th January. He acquitted accused 1 on 27th February. The reasons for the discharge are given in the proceedings of 27th February, but accused 1 and 2 were nevertheless discharged by the order of 29th January. In the final proceedings of the 27th February the Magistrate after calling on the complaint to show cause against action being taken under S. 250, Criminal P. C., ordered him to pay compensation to each of the three accused. The provisions of S. 250, Criminal P. C., are perfectly clear ; "the Magistrate may in his discretion by his order of discharge or acquittal direct" compensation to be paid. Here, in the case of accused 2 and 3, the order for payment of compensation was not made by the order of discharge. The circumstances are not identical with those in *Kashinath* v. *Zinche* (1) or with those *In the matter of the complaint of Safdar Husain* (2), but in those cases it is clearly laid down that the order for compensation must be contained in the order of discharge or acquittal and cannot be made subsequently. The Magistrate's order was without jurisdiction, and was not a mere irregularity covered by S. 537, Criminal P. C. The order awarding compensation to accused 2 and 3 is set aside, and the compensation, if paid, must be refunded.

P.N./R.K. *Application accepted.*

(1) [1901] 14 C. P. L. R. 37.
(2) [1903] 25 All. 315.

A. I. R. 1914 Nagpur 68 (2)

HALLIFAX, A. J. C.

Rajaram—Defendant—Appellant.

v.

Vithal Rao and *others*—Plaintiffs—Respondents.

Second Appeal No. 500 of 1913, Decided on 29th June 1914, against decree of Dist. Judge, Betul, D/- 23rd June 1913.

Transfer of Property Act (4 of 1882), Ss. 72 (b) and 63—Mortgagee in possession constructing well not separable in use neither necessary for preservation from deterioration must go with the land to mortgagor after redemption.

If a mortgagee in possession of agricultural land, without the express or implied consent of the mortgagor, constructs on the land a well the separate possession or enjoyment of which is not possible apart from the land and the construction of which is not necessary to preserve the property from destruction or even deterioration, the well must be delivered with the land to the mortgagor at redemption: 20 *Mad.* 120; 20 *Mad.* 124, *Dist.*; 19 *Mad.* 327, *Foll.*; *Sandon* v. *Hooper*, 49 *E. R.* 820; *Shepard* v. *Jones*, 21 *Ch. D.* 469, *Ref.* [P 70 C 1]

Atmaram Bhagwant—for Appellant.

H. S. Gour—for Respondents.

Judgment.—Both plaintiffs and defendant have appealed against the judgment of the lower appellate Court. The appeal of the former is Second Appeal No. 513 of 1913, and both appeals will be governed by this judgment. The plaintiffs sued to redeem certain absolute occupancy fields mortgaged in 1884 by their deceased father with the defendant and his deceased father as security for a loan of Rs. 200. The property was placed in the possession of the mortgagees who were to enjoy the usufruct in lieu of interest. The defendant resisted redemption on the ground that about a month after the execution of the mortgage-deed, the mortgagor executed a simple bond for Rs. 331 in favour of the mortgagees, in which he agreed that that amount should be charged on the property along with the amonnt already secured by the mortgage. There is a concurrent finding of both the Courts below based on a full consideration of all the evidence given by the defendant, that he has failed to prove execution of this bond by the father of the plaintiffs, which the plaintiffs denied. The whole of the defendant's second appeal is based upon this bond, and as we are now bound

by the finding of fact that it was never executed by the plaintiffs' father, that appeal must be dismissed. I may say that if I had the power to interfere with that finding, I could find no roason for doing so.

The plaintiffs' appeal has reference to the question of addition to the price of redemption of the cost of a permanent improvement to the mortgaged property by the mortgagee in possession. The defendant constructed on the property a brick well at a cost of Rs. 300, which is still in existence, without obtaining the consent, express or implied, of the plaintiffs or their father. In the first Court the defendant's claim to recover the cost of this well was disallowed, on the ground that "there is nothing in S. 72, T. P. Act under which he can claim the value of any such improvements." In appeal the learned District Judge added the Rs. 300 to the amount decreed as the price of redemption, and it is on this point that the plaintiffs are now appealing.

The learned Judge first refers to the two Madras cases of *Rangayya Chettiar* v. *Parthasarathi Naicker* (1) and that immediately following it in the reports, *Krishna Patter* v. *Srinivasa Pattar* (2). In the first of these, he says, "the Madras High Court has emphatically denied the right of the mortgagee to any allowance for improvements," but in the second he finds the principle enunciated that compensation is payable provided the improvement is permanent and existent in reasonably good condition at the time of redemption. "This too," he writes, "has been the view taken in *Rashidunissa* v. *Bhup Singh* (3), where allowance was made for a pacca well which had been made, but not for mud houses for tenants or the cost of manure distributed to the tenants."

All three cases have been misunderstood. In the first Madras case the person held that to be entitled to compensation for .improvements was not the mortgagee but the purchaser of the equity of redemption. As it happened, the same person was first mortgagee of the property, but he did not figure in the suit nor was he in possession of the property in that capacity. All that the judgment says on the matter under discussion is this: "The claim for alleged improvements said to have been effected by the first mortgagee since his purchase cannot, we think, be allowed. In this respect he is in no better position than the mortgagor himself who may choose to spend money on his property. We cannot accede to the view that the improvements were made by the purchaser in the character of mortgagee, for in that capacity he is not shown to have been entitled to possession."

In the second case, *Krishna Patter* v. *Srinivasa Patter* (2), their Lordships were dealing, not with a claim for compensation for improvements, but with a decree which had already allowed that claim, and that not under .the ordinary law but under an implied covenant arising out of local custom in reference to mortgages by way of kanom in Malabar. The matter before the High Court was one of the diminution in the value of improvements that took place between the decree and the redemption, and it was held that the mortgagor could not be called upon to pay for improvements not in existence at the time of redemption, even though they had existed when the decree for redemption was passed.

The reference to the third case seems to be wrongly stated. In Gour's Law of Transfer in British India it is given as 3 *A. L. J.* 24 (*s. n.*) indicating, I understand, the "Short Notes" of other cases attached to the full reports of more important cases in the Allahabad Law Journal. I have been unable to find the reports in the Short Notes,* but if, as is probable, the learned Judge got his report of the case from Dr. Gour's Treatise, where it is mentioned, he has misquoted it. He speaks of a well being made. Dr. Gour's account of the case speaks of a well being reconstructed. Cl. (b), S. 72, T. P. Act leaves no doubt of the right of the mortgagee in possession to reconstruct a well on agricultural land at a reasonable cost.

The case as it appears to me is governed by S. 63, T. P. Act. The leading cases of *Sandon* v. *Hooper* (4) and

(1) [1897] 20 Mad. 120.
(2) [1897] 20 Mad. 124.
(3) [1906] 3 A.L.J. 24 (s. n.)

* The Short Note in question is given in 3 A. L. J. 24—Ed.

(4) 49 E. R. 820=6 Beav. 246=12 L. J.Ch. 309, Affirmed on Appeal 14 L. J. Ch. 120=63 R.R. 72.

Shepard v. *Jones* (5) are not under that Act. None the less the former enunciates exactly the principle of S. 63 and the latter was not a redemption suit but a suit by the mortgagor for an account of the proceeds of a sale effected by the mortgagee under his power of sale. The only case directly in point seems to be *Arunachella Chetti* v. *Sithayi Ammal* (6), where the liability of the mortgagor to pay for any improvements except such as are mentioned in Cl. (b), S. 72 was emphatically denied, unles the improvements were made with his consent given in circumstances making it equivalent to a promise to re-imburse the mortgagees. This restriction of the kind of assent necessary to bind the mortgagor may be as Dr. Rash Behary Ghose suggests on p. 556 of his work on Mortgages, too narrow, but the ruling is otherwise merely an affirmation of S. 63, T. P. Act.

It was argued here that the word "accession" in S. 63 does not include improvements or additions of the kind with which we are now concerned. That this is entirely untenable is clear from the words of the last three of the four paragraphs of the section, and still more so from the second instance of an "accession" appended as an illustration to S. 70 of the same Act. It is clear that separate possession or enjoyment of the well apart from the land is not possible. It must therefore be delivered with the property. This has been the case of both parties all along. It is also clear that its construction was not necessary to preserve the property from destruction or even deterioration, nor did the mortgagor ever consent to its construction in any way. He is therefore not bound to pay its cost to the mortgagee.

The decree of the lower appellate Court will therefore be modified by the substitution of Rs. 200 for Rs. 500 as the amount payable for redemption. The amount of Rs. 200 was deposited in Court before the institution of this suit which was made necessary by the defendant's refusal to accept it as sufficient. The defendant must, therefore pay the whole of the costs of this litigation in all three Courts.

P.N./R.K. *Decree modified.*

(5) [1882] 21 Ch. D. 469=47 L. T. 604=31 W.R. 308.

(6) [1896] 19 Mad. 327.

A. I. R. 1914 Nagpur 70

HALLIFAX, A. J. C.

Bhagwan—Accused.

v.

Emperor—Opposite Party.

Criminal Appeal No. 197 of 1913, Decided on 13th December 1913, against order of Addl. Sess. Judge, Chhindwara, D/- 27th October 1913.

(a) Evidence Act (1872), S. 32 — Unwritten dying declaration may be proved by oral evidence.

A dying declaration not reduced to writing must be proved by the oral evidence of any person who heard it. [P 71 C 1]

(b) Evidence Act (1 of 1872), S. 159 — Police officer testifying to dying declaration can refresh from his notes.

When a police officer is testifying to dying declaration, he can refresh his memory by reference to the notes he may have made or read at the time. [P 71 C 1]

Judgment. — Before Allu Atar, the murdered man died, he made a statement describing the attack on Mt. Baje and himself, which was recorded in writing by Sub-Inspector Sitaram (P. W. 11). The learned Additional Sessions Judge has admitted the document itself in evidence (Ex. P-2) in proof of the statement then made by the dying man, under the authority of the ruling of *Empress* v. *Thakuria* (1). The dictum in that case is too widely stated for general application, though it was doubtless correct in respect of the facts then before the learned Judicial Commissioner. The first of the two published paragraphs is as follows: "I have to observe that as the dying declaration of the deceased, which was taken down in writing by the head constable, was admissible in evidence (S. 162, Criminal P. C.) the proper course was to put in the document itself and have it formally proved by that officer, and not to allow him to give evidence orally as to its purport."

It is probable that the document containing the record of the dying declaration in that case was signed by the deponent, though I cannot find this mentioned anywhere in the judgment of this Court, to which I have referred. With his signature on it, it became a statement in writing made by him, just as any document or deed written for a man

(1) [1894] 7 C. P. L. R. 14.

by another but signed by himself is his own deed. It was then a written statement of the kind mentioned at the beginning of S. 32, Evidence Act, and the correct way to prove it was to put in the document. But in this case the document was not signed by the deponent, and the police officer was bound by law to take it down in writing. The proper method therefore of proving the oral statement of the dying man was by the oral evidence of any person who heard it, that person being allowed to refresh his memory by reference to the notes he made or read at the time. The Sub-Inspector should have been required to read out, as a part of his deposition, his own record of the statement of the murdered man and to give any explanations and add any further details, of which he was reminded by his record or had any recollection apart from it.

P.N./R.K. *Appeal allowed.*

A. I. R. 1914 Nagpur 71

BATTEN, OFFG. J. C.

Vishwanath—Plaintiff—Appellant.

v.

Sitaram—Defendant—Respondent.

Second Appeal No. 239 of 1913, Decided on 29th June 1914, from decree of Addl. Dist. Judge, Wardha, D/- 30th January 1913.

Central Provinces Tenancy Act (9 of 1883), Ss. 47, 48, 60, 71 and 72—Suit for ejectment—Sublease for more than a year cannot be pleaded.

A subtenant under an occupancy tenant, cannot, after the expiry of a year from its commencement, plead as a ground for resisting a suit for eviction, a sublease for a period exceeding one year. The remedies provided by Ss. 47, 48, 71 and 72 are for the protection of the tenant's heirs and of his landlords. [P 71 C 2]

M. R. Dixit and *W. V. Gharpure*—for Appellant.

G. V. Deshmukh and *T. R. Jabade* — for Respondent.

Judgment. — The plaintiff-appellant brought this suit to recover possession of a holding consisting of occupancy and ordinary fields, which have been in possession of the defendant since 1914. The plaintiff has only recently attained his majority, and the plaintiff, who claims to be the adopted son of Pandurang who was admittedly the original tenant, alleges that Pandurang's two widows sublet the fields to the defendant from year to year. The case for the defendant is that the widows are the owners of the tenancy right and that the plaintiff has no title to the fields and that the widows sublet the fields to the defendant for ten years, which period had not expired at the date of the institution of the suit. The learned Additional District Judge has not decided the question of the plaintiff's title, but has dismissed the suit on the ground that the lease for ten years is proved and that the period is not yet expired. The main ground of appeal is that a sublease for ten years is invalid and cannot be given effect to by the Courts. The appeal must in my opinion succeed.

According to S. 60, C. P. Tenancy Act, "a lease granted to a subtenant by an occupancy or an ordinary tenant shall not be valid for a period exceeding one year." It appears to me that this provision can bear only one interpretation, namely that a subtenant cannot, after the expiry of a year from its commencement, plead as a ground for resisting a suit for eviction, a sublease for a period exceeding one year. The learned counsel for the respondent-defendant argues that the sole manner in which a sublease for over one year can be set aside is according to the provisions of S. 47, 48 or 71 and 72, Tenancy Act, and reliance is placed on the ruling of Stanyon, A. J. C., in *Ganeshdas* v. *Shankar* (1). But in that case it has been held that no suit can be maintained in the civil Court to avoid the transfer of an occupancy or ordinary tenant right, if such transfer would be valid but for the prohibitions contained in S. 46 or S. 70. In the present case the sublease for over one year is declared invalid by S. 60, so that it is not invalid only by reason of Ss. 46 and 70. Ss. 46 and 70, and the remedies provided by Ss. 47, 48, and by Ss. 71 and 72, appear to me to be for the protection of the tenant's heirs and of his landlord. Those sections do not enable a tenant himself to avoid a transfer effected by himself, though Ss. 48 and 72 contain a proviso by which a tenant can in certain circumstances step in and secure for himself the advantages of a sublease being set aside at the instance of his heir or of the landlord. S. 60 is a totally separate provision of law, which can be used directly as between the tenant and subtenant. I do not consider Ss. 46 to 48,

(1) [1912] 8 N. L. R. 22=13 I. C. 909.

or Ss. 70 to 72, are any bar to a tenant pleading the proviso to S. 60 in a civil suit.

On these grounds the reason for which the suit has been dismissed by the Additional District Judge is not in my opinion a good reason. I remand the appeal for decision on the other points at issue. Costs will be costs in the suit.

P.N./R.K. *Appeal accepted.*

A. I. R. 1914 Nagpur 72

MITTRA, OFFG. A. J. C.

Raghunath—Appellant.

v.

Ganpat—Respondent.

Second Appeal No. 272 of 1912, Decided on 21st August 1913, from decree of Dist. Judge, Hoshangabad, D/- 26th February 1912.

(a) C. P. Tenancy Act (9 of 1883), S. 38 (2)—"Interest" explained.

The word "interest" in S. 38 (2), means a compensation for the use of money or grain, and therefore includes a repayment in cash or in grain: 11 *C. P. L. R.* 17 *Foll.* [P 73 C 1]

(b) C. P. Tenancy Act (9 of 1883), S. 38—Notice to landlord of all usufructuary mortgages is not necessary.

It cannot be laid down as a hard and fast rule, that all usufructuary mortgages of occupancy rights require notice to the landlords and give rise to a claim for pre-emption: 11 *C. P. L. R.* 127, *Dist.* [P 73 C 1, 2]

J. C. Ghose—for Appellant.

H. S. Gour—for Respondent.

Judgment.—The plaintiff sues to foreclose on a mortgage of two absolute occupancy holdings in two villages of which defendant 3 is the malguzar. The latter obtained a surrender of the holdings, subsequent to the mortgage, under a compromise decree against the original tenants, and leased them to defendant 2 in occupancy right. The suit has been contested by defendant 2. His plea (amongst other pleas) was that the mortgage was not binding on the malguzar or him. Issue 3 was whether the mortgage deed will bind defendants 2 and 3. Both Courts have decided the case with reference to the terms of S. 38, Tenancy Act, 1883, which was in force at the date of the mortgage, and have held that notice to the landlord was not necessary, having regard to the amount secured and the rent of the holdings. A foreclosure decree for the amount claimed has been passed. Defendant 2 has filed this second appeal. It is contended for the respondent that the plea regarding the absence of notice under S. 32, Tenancy Act, has not been properly raised and the point should not be allowed to be argued now. I am of opinion that the parties understood what was meant by the defendant when he questioned the validity of the plaintiff's mortgage as against the malguzar and his transferee. Both Courts have understood the defendants' plea in this sense and it is too late now to object to the somewhat imperfect character of the defendants' plea, when no such objection was taken in the Courts below. I have therefore to decide whether the absolute occupancy tenant was bound to give notice of his intention to mortgage. The aggregate rent of the two holdings is Rs. 31. The mortgage deed recites that four days ago the mortgagor took from the mortgagee Rs. 200, in lieu of which the mortgagor agreed to deliver 20 manis of pisi wheat by instalments of two manis each year, the usufruct of the land being taken at one mani, and an additional mani was to be personally delivered by the mortgagor. In default the instalments are to carry 50 per cent. per annum compound interest. The plaintiff admits having received the first seven instalments. According to the plaintiff Rs. 52,081 are still due, out of which he claims one thousand rupees only. Following the ruling of this Court in *Beni Parshad* v. *Dharamdas Kalar* (1) the lower Courts have held that the interest payable in default should not be taken into account, as on compliance with the terms of the bond, this interest may never become chargeable at all. In this view I entirely concur. But the Courts below hold that no interest is provided for by the bond, and the principle alone must be taken into account in determining whether eight years' rent exceeds the principal and interest payable during the five years after the mortgage. This in my opinion, is unsound. As laid down in the case above cited, "the intention of the legislature in enacting S. 38 (2), Tenancy Act, was to lay down that a mortgage above a certain value should be treated as equivalent to a sale." It appears to me quite immaterial whether the mortgage is for money lent or grain advanced and whether re-payment is agreed to be made in grain or in cash. Both are equally

(1) [1898] 11 C. P. L. R. 17.

within the mischief aimed at by the section. The word "interest" in the section was not, in my opinion, intended to be restricted to a repayment in cash. It means compensation for the use of money or grain. The word "interest" is not a term of art and we must interpret it in the sense in which it is generally understood in this country. To hold as the lower Courts have done, would, in my opinion, be to frustrate the object of the legislature. The respondent's learned counsel argues that as the law favours alienation, I should put a strict construction on S. 38, especially in view of the unrestricted right to mortgage, hitherto enjoyed under the supplementary Wajib-ul-arz by such tenants. But as pointed out by Ismay, J. C., in *Musammat Anandi Bai* v. *Harlal Braham* (2), the Tenancy Act has made considerable changes in the absolute occupancy tenants' power of transfer and I have to give effect to the intention of the legislature as expressed in S. 38. The view which I have adopted is in accordance with an unreported judgment of this Court (*Mohammed Rasoolkhan* v, *Jeonath* (3) where it was held that the word 'payable' in S. 38 should be construed as equivalent to 'receivable by the mortgagee' out of the usufruct. I hold that the mortgage in suit is one which involves the payment of interest, though it is not easy to determine what the rate of interest was.

The appellant relies on the following passage in the judgment of *Mohammed Rasoolkhan* v. *Jeonath* (3), where the usufruct was to be taken in lieu of interest: "The amount of interest cannot be ascertained, and the principle laid down in *Rekchand* v. *Krishna* (4) therefore applies." The case was however really decided on another ground. In the first Court, a similar finding was recorded and it seems that this finding was not questioned in this Court in *Mohammed Rasoolkhan* v. *Jeonath* (3). In *Rekchand* v. *Krishna* (4) the amount secured by the mortgage included future advances and the principal amount was uncertain. In the case before me, the principal amount is two hundred rupees and there is no question of future advances. To lay down a hard and fast rule, that all usufructuary mortgages require notice to the landlord and give rise to a claim for pre-emption would be to discourage a particular kind of mortgage to which no objection can be taken. I think the lower Courts must ascertain what at the date of the mortgage would be reasonably estimated to be the net profits of the fields for the next ten years. To this must be added the estimated price of one mani of wheat each year. Having found the money-value of the instalments, the Court will proceed to determine approximately the rate of interest and then find whether the principal with five years' interest on Rs. 200 exceeds Rs. 248 (that is eight times the rent).

I must notice another argument put forward by the learned counsel for the respondent. It is said that the transaction was not a loan secured by mortgage but a purchase of future crops. The wording and terms of the document leave no room for such a contention.

The decree of the lower appellate Court is set aside, and the appeal is remanded to that Court for a fresh decision with reference to the above remarks. It will be necessary to take further evidence in the case. Costs will follow the result.

P.N./R.K. *Appeal remanded.*

(2) [1902] 15 C. P. L. R. 1.
(3) Second Appeal No. 130 of 1904.
(4) [1898] 11 C. P. L. R. 127.

A. I. R. 1914 Nagpur 73

MITTRA, OFFG. A. J. C.

Mt. Manjula—Defendant—Appellant.

v.

Shankar—Plaintiff—Respondent.

Civil Misc. Appeal No. 13 of 1913, Decided on 20th October 1913, from order of Addl. Dist. Judge, Wardha, D/- 28th January 1913.

Decree—Setting aside—Suit against widow but in name of dead co-widow—Widow accepting summons—Case is one of misdescription and widow is bound by decree—Pleadings—Civil P. C. (1908), O. 22, R. 4.

A widow was sued on a bond executed by her husband. But in the plaint instead of her name the name of her husband's another wife, who had predeceased him, was wrongly entered as the defendant in the case. However, she accepted the summons as a good summons and on her failure to appear on the date fixed for hearing, an ex parte decree was passed.

Held that the wrong description in the summons was a mere irregularity and that the decree was not a nullity on the ground that it had been passed against a person who was dead at the time of the suit. [P 74 C 2]

M. Chakkerbutty—for Appellant.

A. C. Roy—for Respondent.

Judgment.—Suit No. 22 of 1908 in the Court of the Subordinate Judge, Wardha, was based on a bond executed by one Viswanath. The defendant in that suit was described as Lalita, widow of Viswanath. The plaint shows that the defendant was sued as legal representative of the obligor. An ex parte decree was passed, but the defendant's liability was limited to the extent of the assets of her deceased husband. Viswanath had three wives—Annapurna, Lalita and Laxmi. Two of them had predeceased him. On the death of the surviving widow, which admittedly took place after the passing of the ex parte decree Musammat Manjula, the daughter of Viswanath, was brought on the record as the legal representative of the deceased judgment-debtor. She then took the objection that the decree had been obtained against a person who was dead at the time of the suit. Her case is that Laxmi alone survived her husband and that she was not made a party to Suit No. 22. Her objection has been disallowed by the executing Court on the ground that that Court had no power to go behind the decree. She now brings a suit for a declaration that the decree in Suit No. 22 is null and void. The defence is that all the wives of Viswanath came to be named Lalita after their marriage, and that the one who survived him was named Lalita. The first Court held that it was Laxmi who survived Viswanath and that Lalita was the name of the second wife only of Viswanath who had died before the suit. A declaratory decree was granted as prayed for. The lower Appellate Court has ordered an inquiry to be made as to whether the surviving widow was personally served or not, as the summons in that suit purports to bear her mark as Lalita, widow of Viswanath. Against this order of remand the plaintiff has filed this second appeal. Although there are no clear findings yet on the point by the District Judge, it may be assumed for the purposes of this appeal that Laxmi was the name of Viswanath's widow. It must also be assumed, till the inquiry on the point is completed, that she was personally served. Can the decree in these circumstances be treated as a nullity, as having been passed against a dead person? I think not. The suit was against the surviving wi ow of Viswanath. She may have been wrongly described as Lalita. If she had refused to sign the acknowledgment of service endorsed on the original summons the question would have been quite dfferent. Here she is said to have accepted the summons as a good summons ordering her to appear in Court on the date fixed for hearing, notwithstanding that she was wrongly described. In the absence of any fraud practised on her—and in this case there does not appear to be any such allegation—she must be taken to have waived the irregularity in describing her. The copy of the plaint, which is presumably sent with the summons, would have given her notice of the exact nature of the claim against her. She must have known that she was being sued as representing the estate of her deceased husband. I hold that if she had signed the summons, neither she nor the present plaintiff would be at liberty to question the decree as ultra vires. The appeal therefore, fails and is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Nagpur 74

MITTRA, OFFG. A. J. C.

Ramdayal—Appellant.

v.

Motiram—Respondent.

Second Appeal No. 380 of 1912, Decided on 22nd November 1913, from decree of Dist. Judge, Hoshangabad, D/- 2nd May 1912.

(a) Civil P. C. (5 of 1908), Sch. 2, para. 15—Reference in respect of debts on mortgage or other deeds—Reference covers lease for old debts.

A reference to arbitration with regard to debts, whether due in virtue of mortgage bonds or other deeds or not, is wide enough to cover a lease or usufructuary mortgage, the consideration of which is old debts.

A reference to arbitration implies a dispute. [P 75 C 1]

(b) Hindu Law — Debts—Son's liability—Father's reference.

In the absence of fraud or collusion, a reference to arbitration by a Hindu father, is binding on the other members of the family. [P 75 C 2]

G. C. Ghosh—for Appellant.

Judgment.—The plaintiff sues for possession of certain fields on the basis of a zarpeshgi lease. This lease or mortgage was executed in favour of the plaintiff, his father and brothers. The plaintiff's case is that by an arrangement between the members of the family, the plaintiff

was entitled to possession for three years from 1966 Sambat; that the plaintiff entered into possession in pursuance of this arrangement, when he was dispossessed by the defendants. The defence was that the plaintiff's father as manager of the joint family made a reference to the Debt Conciliation Board including this claim, and an award was given in 1903 and that the defendants have obtained possession under the award. The plaintiff denied the reference and added that the award was not binding on him. It has now been found by the Courts below that the plaintiff's father was the manager of the joint family, and that he made a reference to arbitration. This reference was in respect of various claims including the one under the lease or mortgage in suit. The first Court held that the award was not binding on the plaintiff, the lower appellate Court holding a contrary opinion has dismissed the suit. In this second appeal the plaintiff questions the validity of the award.

The first point argued before me is that the award is ultra vires because the reference was with regard to debts only. In my opinion the words "debts, whether due in virtue of mortgage bonds or other deeds or not" are wide enough to cover a lease or usufructuary mortgage, the consideration of which is old debts. The document was produced before the Board, and it did not then strike the appellant's father that it was not a proper subject for arbitration under the reference. I hold that the award is not ultra vires as alleged by the appellant.

The second point argued is that there was no dispute to justify a reference to arbitration. This was never pleaded in the first Court. It is true that the family was in possession under the lease for a number of years before the reference but if this point had been taken in the first Court, the defendants might have pleaded that they would not have referred the other items but for the plaintiff's father agreeing to include this item in the reference. In my opinion the reference to arbitration implies a dispute, and it is too late now to raise this point for the first time in second appeal.

The last point for decision is whether the act of the manager is binding on the plaintiff. There is no suggestion that the manager did not act in good faith, but it is pointed out that the result of the arbitration has not been beneficial to the family. In the case of *Jagan Nath* v. *Mannu Lal* (1)—a case of reference to arbitration—Edge, C. J., and Banerji, J., say: "As such manager he (the father) fully represented the family, and in the absence of fraud or collusion, which has not even been suggested in this case, his acts are binding on the other members of the family." In *Balaji* v. *Nana* (2), Chandavarkar, J., points out that the award of an arbitration is the decision of a quasi-judicial tribunal and cannot be questioned as invalid merely on the ground that its terms are not favourable to one of the parties to it. What we have to look to is whether the reference was for the benefit of the family. To seek an adjudication on a claim disputed or liable to be diputed, in the cheapest way possible, would be the act of a prudent manager, especially if he believes that part of the claim is irrecoverable in law or in regard to the debtor's ability to pay. Nothing has been urged before me to justify my interference with the finding of the District Judge on this point, though I do not agree with all that the District Judge has laid down in his judgment. The appeal fails and is dismissed with costs.

P.N./R K. *Appeal dismissed.*

(1) [1894] 16 All. 231=(1894) A. W. N. 60.
(2) [1903] 27 Bom. 287=5 Bom. L. R. 95.

A. I. R. 1914 Nagpur 75

HALLIFAX, A. J. C.

Husen—Defendant—Appellant.

v.

Rajaram—Plaintiff—Respondent.

Second Appeal No. 381 of 1913, Decided on 25th February 1914, against decree of Divl. Judge., Nerbudda Divn., D/- 11th March 1913.

(a) Minor — Alienation by guardian de facto is void and need not be set aside in suit for possession.

An alienation of the property of a minor by a person who is that minor's guardian de facto, but not de jure, is not merely voidable but absolutely void, and the minor need not sue to have it set aside before he can obtain possession of the property. [P 77 C 1]

(b) Limitation Act (9 of 1908), Art. 91—Applicability.

Article 91, Lim. Act does not apply where the sale is void. [P 77 C 1]

H. S. Gour and *S. R. Pandit*—for Appellant.

J. Mittra—for Respondent.

Judgment.—The plaintiff, Rajaram, is the son of Mt. Lawangai, the younger

of the two widows of his father, Nahad or Naharu. On 25th February 1905 his father's elder widow, Mt. Jamnai, acting on his behalf as his guardian, executed a saledeed of his property in favour of the defendant Husen Rangrez for Rs. 2,000. At that time the age of Rajaram was between 13 and 17 years. One Kushal, son of Gulba, joined Mt. Jamnai in the execution of the deed of sale. He was apparently cousin to the plaintiff, but it seems to have been admitted all through the case that he had no title to the property and was not a necessary party to the transfer. The two widows and Rajaram lived together, and the elderwidow, Mt. Jamnai, seems to have managed the property and the family affairs. The suit out of which this appeal arises was filed by Rajaram on 23rd June 1911, that is to say, within six years and four months of the execution of the saledeed by his stepmother. His own mother, Mt. Lawangai, is still alive.

Rajaram alleged in his plaint that he was then about nineteen years of age and that the saledeed of February 1905 was void, because it was for no consideration and because neither of the executants had any right to deal with his property. He prayed therefore that he might be restored to possession of his property, making an offer at the same time to refund to the defendant any part of the consideration stated in the deed of sale which might be found to have been received for necessary purposes and for his benefit. He added an alternative prayer for joint possession in case it should be found that Kushal was owner of a share at the time of the transfer. It has been fouud in both the Courts below that Rajaram was not twenty years old when he instituted this suit and that of the consideration stated in the saledeed it has been proved that Mt. Jamnai took and applied Rs. 1,275 for necessary purposes and the benefit of the minor. He therefore was given a decree for possession of the property on payment of Rs. 1,275, and this sum is now stated to have been paid into Court on or before the date fixed.

In both the Courts below it has been held that it is unnecessary to decide whether the deed is void or voidable or what article of Sch. 2, Lim. Act applies to the suit, because of the finding that the suit has been brought within three years of the attainment of majority by the plaintiff. Both judgment and decree of the first Court however ordered the deed of sale to be 'dismissed' on payment of the sum found to have been taken for necessary and proper purposes, so that it was there treated as voidable. In the lower appellate Court it was held, on the authority of the ruling of their Lordships of the Privy Council in *Mata Din* v. *Sheikh Ahmad Ali* (1), that the article of the schedule of the Limitaion Act governing the suit is neither 44 nor 91, but 144. This is going beyond their Lordships' judgment, as they refrained from deciding whether the sale in the case before them was void or merely voidable, that is to say, whether Art. 91 did or did not apply to the case. In delivering the judgment, Lord Robson said: "There has been much argument. as to whether a sale by a de facto guardian, if made for necessity, or for the payment of an ancestral debt, affecting the minor's property, and if beneficial to the minor, is altogether void or merely voidable. It is not necessary to decide that question in this case. To begin with the appellant has not succeeded in showing that the disputed sale of 1889, although made for the payment of an ancestral debt, was made of necessity, or was beneficial to the minor. On the contrary, the Courts below have all found on the evidence that it was unnecessary and cannot be said to have been beneficial so far as Ahmad Ali was concerned."

There is, however a distinct indication of their Lordships' opinion on this point in the passage immediately preceding that just quoted, where they said: "It is urged on behalf of the appellant that the elder brothers were de facto, guardians of the respondent, and as such were entitled to sell his property, provided that the sale was in order to pay his debts and was therefore necessary in his interest. It is difficult to see how the situation of an unauthorized guardian is bettered by describing him as a de facto guardian. He may, by his de facto guardianship, assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it." Later

(1) [1912] 34 All. 213=13 I. C. 976 =39 I. A. 49=15 C. C. 49 (P. C.).

also their Lordships described the sale as "effected not by a guardian, but by a wholly unauthorized person." We have also the ruling of the Allahabad High Court in *Nizamuddin Shah* v. *Anandi Prasad* (2), and that of the Calcutta High Court in *Moyna Bibi* v. *Banku Behari Biswas* (3), which are directly in point. I hold therefore that an alienation of the property of a minor by a person who is that minor's guardian de facto but not de jure is not merely voidable but absolutely void, and the minor need not sue to have it set aside before he can obtain possession of the property.

The cases cited as opposed to this view were the rulings of this Court in *Seetaram Sadasheo* v. *Nilu Patel* (4), and *Mt. Tanto* v. *Gajadhar* (5), and of the Allahabad High Court in *Ramausar Pandey* v. *Raghubar Jati* (6), and *Gajeshri Prasad* v. *Dharma Dat* (7). In the first two cases the alienation was by the mother of the minor who was his guardian de jure and also de facto. In the third the plaintiff alleged that the person who had alienated his property during his minority as his mother and guardian was in fact neither, and the learned Judges found in a judgment of four lines that Art. 142, Lim. Act applied. The fourth case was one of alienation by the elder brother of a Hindu minor and in order to enable the Court to decide the question of limitation, the suit was remanded for a finding whether the elder brother was the lawful guardian of the minor or had any other legal power to convey the property or not. The first two cases are therefore distinguishable, and the last two support the view I have taken.

The sale to the defendant being void, Art. 91, Lim. Act does not apply, and under Article 144, which governs the suit, it is well within time. I may say that if it had been necessary for the purposes of this appeal to uphold the findings of the Courts below in respect of the plaintiff's ageas a proper finding of fact, I should have had the greatest difficulty in doing so. The question is however immaterial in the view I have taken. The only other plea taken in appeal was in regard to a suggested ratification by the minor after attaining majority. There cannot, of course, be any ratification of a contract which is void ab initio. In any case ratification was not pleaded in the first Court, and the only evidence now suggested as tending to show that the minor did ratify the contract is the fact that on 12th June 1911 he took a lease from the defendant for one year of two of the six malik-makbuza fields in dispute. The area of the six fields is 52·72 acres, and of the two leased is 16·52 acres, and there is absolutely no evidence to show that when he executed the kabuliyat the plaintiff had that full knowledge of the facts which is essential to ratification or estoppel. The remaining grounds taken in the petition of appeal were expressly abandoned. The appeal is therefore dismissed and the appellant must pay the respondent's costs.

P.N./R.K. *Appeal dismissed.*

(2) [1896] 18 All. 373=(1896) A. W. N. 99.
(3) [1902] 29 Cal. 473=6 C. W. N. 667.
(4) [1888] 1 C. P. L. R. 75.
(5) [1905] 1 N. L. R. 129.
(6) [1883] 5 All. 490=(1883) A. W. N. 64.
(7) [1888] A. W. N. 152.

A. I. R. 1914 Nagpur 77

MITTRA, OFFG. A. J. C.

Nemasa and *others*—Plaintiffs—Appellants.

v.

Ramkrishna—Defendant—Respondent.

Second Appeal No. 286-B. of 1912, Decided on 19th September 1913, from decree of Dist-Judge, East Berar, D/- 26th April 1912.

(a) Civil P. C. (5 of 1908), O. 6, R. 17—Rule of not allowing amendment adding barred fresh relief does not apply when amendment is at instance of defendant.

The general rule that in the absence of any special circumstance a plaintiff will not be allowed to amend by claiming a fresh relief which since the institution of the suit has become barred does not apply when an amendment is ordered in the interest of and at the instance of a defendant: 2 *N. L. R.* 79, *Dist.* [P 78 C 2]

(b) Civil P. C. (5 of 1908), O. 6, R. 17—Amendment.

An amendment relates back to the date of the institution of the suit: 1 *N. L. R.* 117, *Foll.* [P 78 C 1]

(c) Civil P. C. (5 of 1908), O. 6, R. 17—Appellate Court can allow amendment even after limitation when request made within time in original Court.

Where an amendment asked for by the plaintiff himself within the period of limitation is disallowed by a Court of first instance an appellate Court can give effect to the same even though the appellate order is passed after the period of limitation. [P 78 C 2]

Bipin Krishna Bose—for Appellants.

F. W. Dillon and *M. B. Dadabhoy*—for Respondent.

Judgment.—On the 19th May 1892, one Honaji executed a mortgage deed in favour of the plaintiffs mortgaging two fields Nos. 1 and 53. Prior to this, on the 24th April 1892, Honaji had mortgaged field No. 53 to defendant 2 Ramkrishna. The latter obtained a decree for foreclosure against Honaji in Suit No. 55 of 1897, without however making the plaintiffs a party. On the 25th March 1903 the plaintiffs filed the present suit praying for redemption of the second defendant's prior mortgage. One of the pleas taken on behalf of defendant 2 is that he had a right to redeem the plaintiffs. After a protracted trial the Court of first instance decreed the plaintiffs' claim for redemption on the 30th March 1910. Against this decree defendant 2 appealed to Major Morris the then District Judge who notes in his judgment that "defendant 2 appeals on the grounds that he has the right to redeem plaintiffs, and that the amount due to plaintiffs should be decided and he should be allowed to redeem them." The defendant's contention prevailed and on the 22nd December 1910, Major Morris remanded the case for determination of the amount due on the plaintiffs' mortgage. The Munsif found Rs. 951-8-0 the amount due to the plaintiffs for principal, interest and costs, and passed the usual foreclosure decree on the 20th November 1911. Defendant 2 appealed against this decree and in his second ground of appeal urged that the suit is barred by limitation. The plea prevailed in the lower appellate Court and the plaintiffs have now filed this second appeal.

The decision of the lower appellate Court is untenable. In any view of the case the plaintiffs' original suit for redemption could not be dismissed. The learned District Judge thinks that a suit is barred by limitation if a fresh relief or a new cause of action is allowed to be introduced into the plaint by way of amendment. The case of *Shriram* v. *Ganpati Kunbi* (1), which he cites, is no authority for this proposition. The amendment relates back to the date of the institution of the suit: *Mangal Prasad* v. *Chandramall* (2). What was laid down by Ismay, J. C., in *Shriram* v. *Ganpati Kunbi* (1), is that "In the absence of any special circumstances a plaintiff will not be allowed to amend by claiming a fresh relief which since the institution of the suit has become barred." This was a matter which might have been urged before Major Morris. No second appeal was filed from Major Morris' judgment and it is not open to the parties to question it. His successor cannot at a later stage of the litigation, re open the matter. I would go further and hold that the rule laid down in the above case has no application to the present case. As pointed out by Lopes, L. J., in *Weldon* v. *Neal* (3): "The effect of allowing the amendments in this case would be to deprive the defendant of his right to set up the Statute of Limitations. The amendments therefore cannot be allowed without doing injustice to the defendant." In this case the amendment was ordered in the interest of and at the instance of defendant 2. I should note the other defendant has no interest left in the mortgaged property and has since some time ceased to be a party. There appears to me to be another reason why the ruling of *Weldon* v. *Neal* (3) does not apply. Even if the amendment had been asked for by the plaintiffs themselves it was asked for within the period of limitation and the fact of the first Court wrongly disallowing it will not prevent an appellate Court from giving effect to it even though the appellate order is passed after the period of limitation.

The respondents have not pressed for a remand, but have asked me to modify the decree of the first Court. In the first place in the schedule of property to be foreclosed field No. 1 has been inadvertently omitted. This must be rectified in the new decree to be drawn up. Time for payment will be extended to the 20th December 1913, and the plaintiffs will be allowed interest at 6 per cent. per annum on Rs. 951-8-0 from 20th May 1912 to 20th December 1913. Defendant must pay the plaintiffs' costs in the two Appellate Courts. In drawing up the decree the net result of this judgment will be shown by adding the costs to the decretal amount and interest.

I note that defendant 2 upon redemption will acquire all the plaintiffs' rights under the mortgage dated 19th May 1892.

(1) [1906] 2 N. L. R. 79.
(2) [1905] 1 N. L. R. 117.
(3) [1887] 56 L. J. Q. B. 621=19 Q. B. D. 394=35 W. R. 820.

Let a decree be drawn up on the above lines.

P.N./R.K. *Appeal accepted.*

A. I. R. 1914 Nagpur 79

HALLIFAX, A. J. C.

Narayan and *others*—Plaintiffs—Appellants.

v.

Mahadeo—Defendant—Respondent.

First Appeal No. 103 of 1912, Decided on 14th February 1914, from decree of Addl. Dist. Judge, Nagpur, D/- 23rd July 1912.

Evidence Act (1872), S. 115—Subsequent mortgagee joined after limitation at his request—Suit is barred against him though he is estopped from pleading limitation—Order joining him should be set aside—Limitation Act (1908), S. 22.

Where in a suit for foreclosure a subsequent mortgagee was made a co-defendant at his own request and with the consent of the plaintiff, but after the period of limitation as against him had expired;

Held: (1) that the suit against him was barred;

(2) but that, inasmuch as he was made a defendant at his own request, he could not raise the plea of limitation:

(3) that the suit against him ought not to be dismissed, but that the order making him a defendant should be set aside. [P 80 C 1,2]

S. C. Dutt Chaudhari—for Appellants.

M. B. Kinkhede—for Respondent.

Judgment.—The plaintiffs sued on a mortgage executed in 1893. The plaint was signed on 30th of July and presented on 5th August 1910, so that it was only just within time. The defendant Lakhmichand holds a mortgage over a portion of the property, which is dated 13th July 1910. He was not impleaded in the suit at its institution, but applied himself to be made a defendant in July 1911. The plaintiffs asked for time to consider the matter and on 7th August 1911 their pleader stated that they had no objection to his being made a defendant. This was accordingly done and Lakhmichand was called upon to plead. His main plea was as follows:

"Defendant 5 has been joined as a co-defendant to this suit after the limitation for filing the suit as against him had expired. The plaintiffs are not therefore entitled to have any foreclosure decree passed as against him. The plaintiffs' suit is barred by time and should be dismissed with costs and the defendant's costs certified against them."

He then went on, in the alternative, to deny execution and attestation and receipt of consideration, and to plead satisfaction, estoppel by conduct, absence of any agreement to pay the interest claimed, collusion between the plaintiffs and the mortgagors and failure to join several necessary parties both as plaintiffs and defendants.

The plaintiffs replied that they had never heard of defendant 5's mortgage before, which seems highly probable, when we consider the date of its execution, a fortnight before the plaint was signed, three weeks before it was presented and less than a month before the period of limitation for the claim, and all other such claims between 12 and 60 years old, ran out. They went on to plead that limitation was no bar to their getting a decree against Lakhmichand because he had come into the suit at his own request, with what was practically an offer to redeem if the mortgage should be found to be valid and his right of redemption was not barred by time. They further traversed all his pleas of fact, which they described as inconsistent with considerable truth. The first issue framed was:

"Is the claim barred against defendant 5 because he was joined after the period of limitation for filing the suit had expired?" It was, of course, held that the suit against Lakhmichand was barred by time. So much of the suit was accordingly dismissed, but Lakhmichand was ordered to pay his own costs because he had been made a defendant at his own request.

It will he convenient to confine the discussion to this portion of the case for the present. In their petition of appeal the plaintiffs pray that their claim shall be decreed against Lakhmichand as well. Their learned pleader has however retired in argument from this obviously untenable position and urges now that Lakhmichand should only be discharged from the suit as an unnecessary party and that the suit against him should not be dismissed. That no decree for foreclosure could be passed against Lakhmichand is very clear from the ruling of the Allahabad High Court in *Sanwale Singh* v. *Ganeshi Lal* (1), and the ruling of a Full Bench of the Calcutta High Court in *Ramkinkar Biswas* v. *Akhil*

(1) [1913] 35 All. 441=20 I. C. 41.

Chandra Chaudhuri (2). The case now put forward is that Lakhmichand in effect pleaded a paramount title and was therefore not a necessary party to the suit, and he should therefore have been discharged from it: *Sanwal Singh* v. *Ganeshi* (1) and *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (3). This is practically what is urged in the petition of appeal, though the relief asked is overstated.

The respondent Lakhmichand's reply is that as the plaintiffs agreed to his being made a party to the suit and accepted his challenge to try out the question of limitation and went to trial on that issue, they cannot be allowed to urge in appeal for the first time that he was not a necessary party to the suit. The rulings quoted in support are the latter part of the same Calcutta case of *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (3) and the ruling of this Court in *Kasham Khan* v. *Mt. Sawitri* (4). This argument is based on a misconception of the facts. The plaintiffs never accepted any challenge to have the question of limitation tried out, nor did any such issue arise from the pleadings. They admitted that their suit for foreclosure was barred by limitation against Lakhmichand, as it very obviously was, but pleaded that, as he had come in at his own request, the suit ought to be treated as a redemption suit filed by him, which was not so barred.

The defendant came in with an offer which the plaintiffs were quite justified in regarding as an offer to waive the question of limitation and to redeem their mortgage if it were found to be valid, in order to save himself the trouble and expense of a redemption suit. It was to all appearance a challenge to have the suit tried out on the merits. That they did regard it in this light is clear from their reply to the defendant when he put in his plea of limitation after being made a party, and from their petition of appeal. It was obviously on that understanding that they agreed to his being made a party. The Calcutta ruling and that of this Court which have been quoted on behalf of Lakhmichand seem to me therefore to operate much more against him than against the plaintiffs, and to debar him from asking that the suit against him should be dismissed. On the other hand there is nothing in the principles laid down in them to prevent the plaintiffs asking that the order making Lakhmichand a party, to which they had agreed under a misapprehension raised and encouraged by him, should be cancelled and that his name should be removed from the list of defendants. This is what they mean when they speak of his being discharged, though the Civil Procedure Code contains no mention of the discharge of a defendant.

I am bound to admit that I am still unable to see what difference it makes to either party whether the defendant is "discharged," or the suit against him is dismissed. If the suit is dismissed the plaintiffs cannot foreclose against Lakhmichand, but their right to do that and so to compel him to redeem them was dead long before he asked to be made a party to the suit. If Lakhmichand or the mortgagors should choose to redeem the plaintiffs' mortgage within the time allowed by the decree in this suit, no question between Lakhmichand and the plaintiffs will ever arise. But if that mortgage is not redeemed and they get possession of the property they will then be able to redeem Lakhmichand as they will then stand in the shoes of the mortgagors. No plea of res judicata can be raised against them out of the result of the decision of this suit, which is apparently what both they and Lakhmichand anticipate, because their right to redeem will only come into existence when they get possession of the property on foreclosure. Both parties have however contested this appeal very strenuously, and their advisers seem to be convinced that each of them has a lot to gain or lose by it. I am not prepared to say that there is no possibility of future advantage or disadvantage to either party from the decision of this point though I am unable to imagine any such possibility. I order therefore that the name of Lakhmichand be removed from the list of defendants, and that the words in the decree dismissing the suit as against him be expunged therefrom.

P.N./R.K *Order accordingly.*

(2). [1908] 35 Cal. 519=11 C. W. N. 350=5 C. L. J. 242 (F. B.).
(3) [1906] 33 Cal. 425=3 C. L. J. 205.
(4) [1913] 9 N. L. R. 38=19 I. C. 547.

A. I. R. 1914 Nagpur 81

MITTRA, OFFG. A. J. C.

Sheo Lal—Appellant.

v.

Mt. Sheorajia—Respondent.

Second Appeal No. 34-B of 1913, Decided on 27th October 1913, from decree of Dist. Judge, East Berar, D/- 23rd August 1912.

(a) Adverse Possession—Limited owner—Assertion of absolute ownership is acquired.

When a person enters on land under a title as heir, which is necessarily a limited title, very cogent evidence is necessary to show that the said person afterwards asserted a title as absolute owner. [P 82 C 1]

(b) Adverse Possession—Limited owner—Hindu widow acquires only limited interest.

A person in the position of a Hindu widow may claim only a limited interest, and when she does so the interest claimed is all that is acquired by prescription. [P 82 C 1]

(c) Hindu Law—Succsssion—Daughter-in-law.

A Hindu daughter-in-law in Bombay does not succeed as an absolute owner nor does she in Berar. [P 82 C 1]

Bipin Krishna Bose and *J. C. Ghose*—for Appellant.

P. S. Kotwal—for Respondent.

Judgment.—The parties are Kanaoji Brahmins from the United Provinces and it is now admitted that they are governed by the Benares School of Hindu law. They are settled in Berar where the Bombay School of law prevails. It has been now found that the property in suit was acquired by Chuniabai, widow of Chandidin and must be treated as her stridhan. Chuniabai died in 1889, leaving a daughter, the present defendant, and a daughter-in-law, Must. Parwati, widow of her predeceased son, Sheobhajan. The plaintiffs are the brothers of Chandidin, husband of Chuniabai. There can be no doubt that the defendant was the sole heir to Chuniabai's estate on the latter's death, neither Mst. Parwati nor the plaintiffs having any title to it. Parwati however entered into possession and remained in possession till her death in 1908. The plaintiffs' case is that Parwati acquired an absolute estate by adverse possession, and that the plaintiffs are the heirs to her stridhan property, being the nearest sapindas of her husband. The defendant does not deny that the plaintiffs would be the heirs to any heritable estate acquired by Parwati. The Courts below have dismissed the plaintiffs' claim on the ground that Parwati's possession was not adverse to the defendant.

In my opinion the finding of the lower Courts as to the nature of Parwati's possession cannot be upheld. The reason which has mainly induced the lower Courts to adopt this view is that the defendant was a minor at the time of her mother's death, that she lived with Mt. Parwati even after her marriage and was maintained out of the estate. But Parwati appeared before the revenue Court and claimed title as daughter-in-law of the deceased, ignoring entirely the minor's existence. There is nothing on the record to bear out the suggestion that she entered as guardian or trustee on behalf of the defendant. She never relinquished possession on the defendant's marriage or even after the latter had attained majority. She leased out the property from year to year. She certainly regarded herself as an owner—whether an absolute owner or one with a limited interest will be discussed later. Under the law she had not a claim for even maintenance on the estate of her mother-in-law and yet it was the defendant who was treated as a person having only a legal or moral claim for maintenance. I hold that Parwati's possession was in the character of an owner and not as trustee for the defendant. The possession was therefore adverse to the defendant.

The question to be discussed now is the nature of the estate acquired by Mt. Parwati. It is clear that defendant succeeding to her mother stridhan property would acquire a limited estate under the Benares School of Hindu law: *Sheo Shankar Lal* v. *Debi Sahi* (1), *Sheo Partab Bahadar Singh* v. *Allahabad Bank Ld.* (2). By excluding the defendant, Parwati could not acquire an interest which would affect the rights of the reversioner, that is the defendant's son; but his right to possession will accrue under Art. 141, Lim. Act on his mother's death. The suit for possession however will have to be decreed for the present, unless Parwati claimed merely a Hindu widow's estate. The judgment of their Lordships of the Privy Council

(1) [1903] 25 All. 468=30 I. A. 202=5 Bom. L. R. 828=13 M. L. J. 330=7 C. W. N. 831 (P. C.).

(2) [1903] 25 All. 476=30 I. A. 209=5 Bom. L. R. 833=7 C. W. N. 840=13 M. L. J. 336 (P. C.)

in *Lachhan Kunwar* v. *Manorath Ram* (3) shows that a person in the position of a Hindu widow may claim only a limited interest, and when she does so the interest claimed is all that is acquired by prescription. If Parwati claimed a Hindu widow's limited interest, there is no question of succeeding to her estate. We shall in that case have to find out who are the heirs to the last full owner, Chuniabai, and admittedly the defendant is that heir.

The important and somewhat difficult question now to be determined is whether Parwati claimed an absolute or a limited estate. She did not enter on the land as a trespasser. She claimed title as daughter-in-law. Such a claim would be easily recognized in Berar where the Bombay law is followed. This, in my opinion, accounts for the report made by the patel and the patwari and the order passed by the Tahsildar. But the daughter-in-law in Bombay does not succeed as an absolute owner nor does she in Berar. She never attempted to sell or mortgage any portion of the estate. The leases given were either yearly leases or leases for short terms. She never attempted to make a gift of any portion of the property. It is true that on her death bed she attempted to make a will in favour of the defendant who would be equally heir without the will. I cannot attach any importance to this as it was after all a recognition of the defendant's right to succession under the law. The will or its draft is not on the record. The evidence on the point does not show that she believed that she could leave even legacies to others. When a person enters on land under a title as heir which is necessarily a limited title, as in the present case, very cogent evidence is necessary to show that she afterwards asserted a title as absolute owner. On the whole I think Parwati merely claimed a daughter-in-law's limited interest and on her death, her estate came to an end. The view I have adopted is in accordance with my learned predecessor's judgment in *Ramprasad* v. *Dayaram* (4). I have already pointed out that if there is no question of succession to any estate acquired by Parwati, the defendant would come again as her mother's heir. The appeal fails and is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

(3) [1895] 22 Cal. 445=22 I. A. 25 (P. C.).
(4) Second Appeal No. 365 of 1911.

A. I. R. 1914 Nagpur 82

MITTRA, OFFG. A. J. C.

Bapu—Defendant—Appellant.

v.

Bhiwaji—Plaintiff—Respondent.

Second Appeal No. 333-B of 1913, Decided on 6th January 1914, from decree of Addl. Dist. Judge, Amraoti, D/- 3rd October 1912.

(a) Hyderabad Assigned Districts Courts Law (1889), Ss. 57 (2) (d) and 9 (1) (a)—Assistant Commissioner exercising power of Deputy Commissioner for trying suits is not District Court for appointing guardian—Appointment of guardian by him is ultra vires.

An Assistant Commissioner invested with the powers of the Court of a Deputy Commissioner for the trial of original suits exceeding five thousand rupees in value, without limit as regards the value, is invested only with some of the powers of a Deputy Commissioner, viz., the power to try original suits, and is not the District Court for any other purpose. Therefore if acting as the District Court, under the Guardians and Wards Act he appoints a guardian. his order is ultra vires and does not require to be set aside. [P 84 C 1]

(b) Majority Act (9 of 1875), S. 3—Order of Court without jurisdiction is nullity.

Although the words "Court of justice" in the Majority Act are not qualified in express terms by the words "competent in this behalf," on general principles of law the act of a Court without jurisdiction is a nullity. [P 84 C 2]

B. K. Bose, *F. W. Dillon* and *J. C. Ghose*—for Appellant.

G. V. Deshmukh and *D. N. Khare*—for Respondent.

Judgment.—The plaintiff sues to recover possession of his share in a field sold by himself on 29th July 1898 to one Panjaubrao. The defendant is a transferee of Panjaubrao under a sale deed dated 23rd August 1899. It is not disputed that the plaintiff was born in January 1878. On 29th April 1893 one Gangaram was appointed the guardian of the plaintiff's person and property by Mr. Banduji Janardan, a civil Judge. Again on 16th June 1896, on the death of Gangaram, one Zingooji was appointed the plaintiff's guardian by the same officer. The question for decision is whether the plaintiff attained his majority at the age of 18 or at the age of 21. If he attained majority at the age of 21, as contended for by him, he was a minor at the date of the sale, otherwise he was major.

The Guardians and Wards Act (Act 8 of 1890) was applied to Berar, "so far as its provisions may be suitable," with effect from 1st January 1891 (Foreign Department Notification No. 4284-1 dated Fort William, 17th December 1890, published in Hyderabad Residency Orders, 15th January 1891, Part 1, p. 10). This notification cancelled Foreign Department Notification No. 212-J, dated 24th October 1873, in so far as it relates to Act 40 of 1858 (Minors) and also Home Department Notification No. 618 (Judicial), dated 15th May 1878, relating to Act 9 of 1861 (Minors). The Guardians and Wards Act was then the sole statutory provision in force in Berar from 1st June 1891 in regard to the appointment of guardians for minors.

By Notification No. 93, dated 4th April 1892 (published in Residency Order 16th April 1892, Part 1, p. 86), in exercise of the powers conferred by S. 9 (1) (a), Hyderabad Assigned Districts Courts Law, 1889, the Resident was pleased to invest Mr. Banduji Janardan with the powers of the Court of a Deputy Commissioner for the trial of original suits exceeding Rs. 5,000 in value without limit as regards the value, and to declare that the powers shall be exercised within the area of the district to which he may be attached.

By Notification No. 307, dated 3rd October 1893 (Residency Orders, dated 16th October 1893, Part. 1, p. 195), Mr. Banduji Janardan, Civil Judge at Amraoti, was invested with the powers of the Court of a Deputy Commissioner under S. 7 (2) (b), Hyderabad Assigned Districts Courts Law in respect of (amongst other Acts) Act 40 of 1858. At this date Act 40 of 1858 had been repealed by the Guardians and Wards Act as introduced into Berar.

By Notification No. 53, dated 27th February 1896 (Residency Order, dated 2nd March 1896, Part 1, p. 45, the Notification No. 307 mentioned in the preceding paragraph was cancelled.

For the defendant appellant it has been argued that the action of the Resident in investing Mr. Banduji Janardan with the powers of the Deputy Commissioner under Act 40 of 1858 or Act 8 of 1890 was ultra vires. In support of this argument reliance is placed on an opinion expressed by Stevens, J. C., in *Kanhoji Ran* v. *Gangabai* (1) and the circular referred to in that case at p. 21. For the respondent it is contended that too narrow a construction has been placed on that ruling on the power of the Local Government to invest officers with the powers of a Deputy Commissioner other than powers to try original civil suits. It is however unnecessary for me to express any definite opinion in this case on the point raised. The appointment of Gangaram by Mr. Banduji Janardan was made before Notification No. 307 investing him with powers of a Deputy Commissioner under the Minors Act. The second appointment of Zingoo also took place after Notification No. 307 was cancelled.

The question now for decision is narrowed down to this : Was the Court of Mr. Banduji Janardan the District Court within the meaning of the Guardians and Wards Act ? He was an Assistant Commissioner of the first class invested by Notification No. 93, (supra, para. 3) with the powers of the Court of a Deputy Commissioner for the trial of original suits exceeding five thousand rupees in value without limit as regards the value.

There can be no doubt that the Court of the Deputy Commissioner is the District Court or principal civil Court of original jurisdiction in the district [S. 7 (2) (b), Hyderabad Assigned Districts Courts Law, 1889].

The Resident may, by order in writing invest any person with all or any of the powers of the Court of the Deputy Commissioner under the Hyderabad Assigned Districts Courts Law, 1889. A person so invested with the powers of a Deputy Commissioner is designated Civil Judge.

Under S. 9 (3), Hyderabad Assigned District Courts Law, 1889, the 'Court of a Civil Judge shall, for all purposes connected with the exercise of the powers with which the Civil Judge has been invested, be deemed to be the Court of a Deputy Commissioner.

In the view taken by Stevens, J. C., in the case cited above, Mr. Banduji Janardan would have been incompetent to try applications under the Guardians and Wards Act even if he had been invested with "all" the powers of a Deputy Commissioner under the Hyderabad Assigned District Courts Law, 1889, the

(1) [1896] 9 C. P. L. R. 19.

wording of the latter Act being almost the same as that of the Central Provinces Courts Act (16 of 1885). As a matter of fact, that officer was only invested with some of the powers of a Deputy Commissioner, viz. the power to try original suits. In Miscellaneous Appeal No. 162 of 1902 Mr. Hare, Officiating Judicial Commissioner Berar, accordingly held that Mr. Banduji Janardan in 1902 had no powers to hear applications under the Guardians and Wards Act. This ruling of Mr. Hare appears to me to be perfectly sound. The Court of Mr. Banduji was the District Court only so far as the trial of original suits is concerned. It was not the District Court for any other purpose, not the district Court for the purposes of the Guardians and Wards Act.

It is unnecessary for me to express any opinion in this appeal as to the powers of Mr. Banduji so long as Notification No. 307, mentioned in para. 4 of this judgment, was in force.

This is not a case where long and uninterrupted contemporaneous usage can be relied on to justify a particular construction of a statute on which its usage proceeded. The illegality of the practice of Civil Judges trying cases under the Guardians and Wards Act was pointed out by Mr. Hare in 1902, and I ought to follow Mr. Hare's judgment especially as my own opinion coincides with his.

The result is that the two appointments were made by a Court not competent to make such appointments under the only statutory provisions then in force, the Guardians and Wards Act, as applied to Berar "so far as its provisions may be suitable." I do not see how the last words relied on by the respondent can affect the decision of the question before me. There is nothing in the laws of Berar which makes the exercise of exclusive jurisdiction by the District Judge or Deputy Commissioner under that Act unsuitable.

The lower appellate Court has held that although the appointment of the guardian was ultra vires in this case, yet as there was in fact a guardian appointed by a Court of justice, the plaintiff is entitled to the benefit of the extended period of minority. In the argument for the respondent it is suggested that the legislature meant to draw a distinction between the case where a guardian is appointed by a Court of justice and one where the appointment is by any other authority. Reference is made to S. 52 and S. 53, Guardians and Wards Act. As regards a Court of justice, it is contended that the appointment is good unless set aside, even if made by a Court not competent in this behalf, but competency, it is argued, is expressly required of any other authority making an appointment. I am however unable to agree with this contention. If the act of the Civil Judge was ultra vires, it did not require to be set aside. There was no appointment of a guardian in the eye of the law, the proceedings being null and void. Although the words "Court of justice" in the Majority Act are not qualified in express terms by the words "competent in this behalf," it follows from general principles of law that the act of a Court without jurisdiction is a nullity.

The plaintiff therefore attained his majority at the age of 18, and the sale sought to be impeached is therefore binding on the plaintiff as he was not a minor at the date of the sale

The decrees of the lower Courts are set aside and the plaintiff's suit is dismissed with costs in all Courts.

P.N./R.K. *Suit dismissed.*

A. I. R. 1914 Nagpur 84

HALLIFAX, A. J. C.

Haijnath—Defendant—Appellant.

v.

Raghunath—Plaintiff—Respondent.

Second Appeal No. 365 of 1913, Decided on 2nd March 1914, from decree of Dist. Judge, Raipur, D/- 25th March 1913.

Landlord and Tenant—Landlord alone can accept surrender or create tenancy—Presumption that lambardar is agent of proprietary body is not applicable when lambardar is minor.

It is only the landlord that can accept a surrender or create a tenancy. Where the "landlord" is a body of two or more persons, anything which the landlord is required or authorized to do under the Tenancy Act must be done by the whole proprietary body acting together or by an agent acting on behalf of them all.

The custom of appointing the lambardar as agent by implication and acquiescence is so nearly universal that it may be presumed that the lambardar has been appointed the agent of the proprietary body in every village, until the contrary is shown. But the presumption does

not extend to the case of a minor lambardar, nor that of his guardian. [P 86 C 2]

H. S. Gour—for Appellant.

Bepin Krishna Bose—for Respondent.

Judgment.—The plaintiff Raghunath, who is the respondent here, and the defendant-appellant Haijnath are cosharers in the village of Mendrakka. There is one other cosharer, but we are not concerned with him in any way. Haijnath is the lambardar of the village. He is still a minor, and his mother is his legal and actual guardian. The cosharer Raghunath sued the lambardar and two ordinary tenants of the village for joint possession to the extent of his share in the village, or separate possession of a part, proportionate to his share in the village, of a certain piece of land. He sued Haijnath as a minor and his mother was duly appointed his guardian ad litem. In the plaint he stated that the land had been surrendered by a person who had been holding it as an ordinary tenant "to the lambardar, defendant 1," and he claimed therefore a right to a share in that land proportionate to his share in the village. He went on to say that "defendant 1" let out that land to the other two defendants and made them ordinary tenants thereof on his own authority and without the plaintiff's permission or knowledge. He asserted that "defendant 1 had no right or authority whatsoever to transfer to anybody rights or privileges in land belonging jointly to the plaintiff which has been surrendered." He therefore made the claim set out above.

The written pleading filed on behalf of defendant 1 opens with these words: "The defendant Haijnath files the following written statement." He then went on to admit most of the facts stated in the plaint, but pleaded that the surrender was in consideration of a sum of money "received from this defendant," that he had created the new tenancies with the consent of all the cosharers, and that in any case he had authority as lambardar to create them without consulting the cosharers. He further pleaded that "the land in suit was surrendered to this defendant, not in his capacity as lambardar, but in his capacity as a cosharer and for value, "so that for that reason also he had a right to create the new tenancies without consulting the other cosharers.

The plaintiff replied that if defendant 1 had really paid the amount alleged, he was willing to contribute his share of it, but he demanded an account of the nazarana which he believed the defendant had received from the new tenants. He denied that the surrender had been accepted with the consent of the cosharers and then said, "that as lambardar defendant 1 can act as agent of the other cosharers with their consent, and not do acts at his wish without their consent and against their will." In the first Court it was found that the surrender was made to the lambardar represented by his guardian and the new tenancies were created by the same person on the same day. The learned Subordinate Judge went on hold, on to the authority of certain unpublished rulings of this Court, "that in the absence of express repudiation of his authority, the lambardar is the representative of the entire proprietary body in such transactions as accepting of surrender from one tenant and the re-letting to another of tenancy land." Finding that there was in this case an absence of express repudiation of the authority of the lambardar, declared before the transaction, he held that the lambardar had acted as agent of the whole proprietary body, and dismissed the suit.

In appeal to the Court of the District Judge the plaintiff pleaded for the first time that the new tenancies had been created not by the lambardar, who was a minor, but by his guardian whose acts were not binding on the other cosharers. On this point the learned District Judge wrote as follows in his judgment, "Defendant 1 is still a minor and it is admitted that his guardian mother, who is said to have constituted new tenancies was neither the lambardar nor lambardar gumashta. A guardian as such has no power of a lambardar or lambardar gumashta. Truly the plaintiff's claim for possession was not opposed on this ground in the lower Court, but the point involved seems to be purely a question of law and not a mixed question of fact and law. It was never pleaded that there was any lambardar gumashta and that the consent of such a person had been obtained. All that was alleged was that the consent of the other cosharers had beeen obtained and this plea was negatived by the lower Court. The

correctness of that finding was not challenged for the plaintiff-appellant and that finding stands final. I therefore dissenting from the lower Court hold that defendants 2 and 3 were not validly constituted tenants and that the plaintiff is therefore entitled to joint possession of the land in suit.

As will appear later, the point raised involved more questions of fact than of law. The decision of them is however covered by the plaintiff's own admissions in the first Court. I fail to understand the reference to the lambardar gumashta. Such a person would seem to have about as much to do with the matter as the mukaddam or the kotwar. They all, like the guardian of a minor lambardar or indeed any outsider, are equally capable with the lambardar of being appointed agent of the proprietary body. The only difference is that the implied appointment of the lambardar or the lambardar gumashta is ordinarily very much easier to prove than that of any of the others. In any case, no question of the consent of the lambardar gumashta could possibly arise here. Further, as an alternative to the plea express consent of the cosharers it was very distinctly pleaded that the lambardar had in this case the power to create the tenancies without consulting them. This was stated in the following words: "This defendant contends that as a lambardar of the village he had power to create tenants in respect of such lands which were surrendered to him in his capacity of lambardar of the village without the consent of the cosharers." It would seem to be a mere slip that the learned Judge mentioned the plaintiff-appellant in place of the defendant-respondent, as the person who would be likely to object to the finding that the express consent of the cosharers had not been obtained.

The law on this pont is clear and well settled. It is expounded in the rulings of this Court in *Pratap Singh* v. *Umrao Singh* (1); *Gopal* v. *Govind* (2) and *Murlidhar* v. *Jagannath* (3). It is only the landlord that can accept a surrender or create a tenancy. Where "the landlord" is a body of two or more persons, anything which the landlord is required or authorized to do under the Tenancy Act must be done by the whole proprietary body acting together or by an agent acting on behalf of them all. The appointment of this agent need not be express, and it very seldom is. It is customary to appoint the lambardar as agent by implication and acquiescence, and this custom is so nearly universal that it may be presumed that the lambardar has been appointed the agent of the proprietary body in every village, until the contrary is shown. That presumption might perhaps extend to the case of a lambardar gumashta but no further. It would not cover the case of the guardian of a minor lambardar. Nor can it cover the case of a minor lambardar himself. He could act as agent for the other members of the proprietary body so that his acts would bind them, but he himself would not be bound by them. One member of the proprietary body would thus be unrepresented by the agent.

But though there can be no presumption that any person other than the lambardar has been appointed the agent of the proprietary body, there is nothing to prevent any person in the world being so appointed and when that appointment is admitted or proved, that person will represent the proprietary body and bind it by his acts just as effectively as the lambardar could. In this case the plaintiff has from the very begnining admitted the implied appointment of the lambardar's mother as agent of the proprietary body. This is the matter of fact involved in his plea taken for the first time in the appellate Court, which the learned Judge of that Court overlooked. The admission seems to me necessarily implied in all the plaintiff's pleas in which he speaks simply of the lambardar and defendant 1 when he sued him as a minor with his mothar as his guardian and knew that the surrender was accepted, and the leases granted by his mother. But even if that could not be called a necessary implication the admission is to be found made almost expressly in the plea, on which both in the plaint and in all the subsequent stages of the suit he has insisted most, that the surrender made to the guardian of the lambardar was a surrender to the whole proprietary body. By admitting that

(1) [1898] 11 C. P. L. R. 1.
(2) [1900] 13 C. P. L. R. 113.
(3) A. I. R. 1914 Nag. 4=23 I. C. 20=10 N. L. R. 5.

she was the agent of that body for the purpose of accepting the surrender, he also admitted that she was the agent for the purpose of granting fresh leases.

The leases were therefore made by an authorized agent of the whole proprietary body and are valid against all the members of that body. The decree of the lower appellate Court is therefore set aside and that of the first Court dismissing the suit is restored. The plaintiff-respondent will pay all the costs in all three Courts.

P.N./R.K. *Decree set aside.*

A. I. R. 1914 Nagpur 87

HALLIFAX, A. J. C.

Haria—Defendant—Appellant.

v.

Manakchand—Plaintiff—Respondent.

Second Appeal No. 304 of 1913, Decided on 15th July 1914, from decree of Dist. Judge, Narsinghpur, D/- 20th February 1913.

Evidence Act (1 of 1872), S. 32 (2)—Statement by deceased scribe of a bond as to marks (nishani) of executant are admissible being made in ordinary course of business as bond-writer.

The bond in suit purported to be executed by three persons who were all dead. The signature of each of them was represented by an irregular scribble such as might be made by an illiterate person and against each of these marks there was the statement that it was the mark (nishani) of one of the executants the name being given in each case. The scribe and the attesting witnesses were also dead. The whole of the bond including the statement as to the marks was proved to be in the handwriting of the deceased scribe by the evidence of his father, a bond-writer.

Held: that direct evidence was to be found on the bond itself in the written statement made by the deceased scribe that the signatures were those of the persons whose names were written against them and that statement was relevant under S. 32 (2), Evidence Act, having been made by the deceased scribe in the ordinary course of his business as bond-writer.

[P 88 C 1]

G. P. Dick—for Appellant.

Bipin Krishna Bose—for Respondent.

Judgment.—The plaintiff who is respondent in this Court sued on a mortgage bond dated the 29th of September 1892, purporting to be executed by three persons who are all now dead. The signature of each of them is represented by an irregular scribble such as might be made by an illiterate person and against each of these marks there is the statement that it is the mark (nishani) of one of the executants, the name being given in each case. These three statements are in the same handwriting as that of the rest of the bond. That is proved by the statement of Bhagwandas Brahmin (P. W. 1), who describes himself as a bond-writer to be the handwriting of his deceased son Ramdayal. He stated in the first Court that the bond, that is presumably all of it that was not obviously in a different handwriting, was in that of his son and this might well be held to include the statement that he was again called in the lower appellate Court to make, that the names of the executants were also written by his son. Both attesting witnesses also are dead and the signature of each of them has been satisfactorily proved to be in his handwriting.

The mortgage secured a debt of Rs. 900 and it was stipulated that this sum was to be repaid on 3rd May 1901 and till it was repaid the mortgagee was to remain in possession of the property and appropriate all the profits in lieu of interest. The mortgagee has actually been in possession under this agreement ever since. Of the six defendants one only appeared to defend the suit. He is the son of one of the executants and the grandson and nephew of the other two and he said: "I know nothing about the execution of the bond in suit by my father. Harbans was my grandfather and Mulli was my uncle. They died, but when, I cannot say. Plaintiff is in possession of the land claimed. I have got no means to redeem the mortgage even if proved."

Apart then from the formalities required by Ss. 68 and 69, Evidence Act, it seems clear that the genuine nature and the validity of the document have been fully proved having regard to the definition of proof in S. 4 and the rule of common sense enunciated in S. 114 of that Act. Compliance with those formalities is however necessary. In the first Court it was held that the last of those prescribed by S. 69, proof that the signatures of the ostensible executants were the signatures of the persons named, had not been carried out because there had been no attempt to prove who wrote the names which appear against the marks which are the signatures of the executants. As has already been pointed out there was some evidence on this point. The deficiency such as it was, was however made good in the lower appellate Court and it was

there held that sufficient proof of the execution of the bond had been given to satisfy the requirements of S. 69. Against this finding the defendants have appealed.

On the line of reasoning adopted in *Abdulla Paru* v. *Gannibai* (1), I am satisfied that there is evidence on the record directly tending to show that the signature marks on the document were made by the alleged executants and that therefore the finding of the lower appellate Court that that fact is proved cannot now be assailed. That direct evidence is to be found on the bond itself in the written statement made by the deceased scribe that the signatures are those of the persons whose names are written against them. That statement is proved by the evidence of Bhagwandas (P. W. 1) and it is relevant under S. 32 (2), Evidence Act, because it was made by the deceased Ramdayal in the ordinary course of his business of a bond-writer. For the appellants it is objected that there is nothing to show that Ramdayal was a bond-writer. The evidence on the point is certainly not strong because the point was never raised, but I consider it to be sufficient. He was the son of a bond-writer who appears to regard the writing of this bond by him as quite in the ordinary course of affairs and the writing and the manner and the terms of the bond are all evidence of its having been written by a professional bond-writer. In the absence of even a suggestion to the contrary I hold therefore on this evidence that the bond was written by Ramdayal in the ordinary course of his business. This finding given under S. 103, Civil P. C., makes the written statement of Ramdayal in regard to the persons by whom the signatures on the bond were made relevant under S. 32 (2), Evidence Act. There are many strong reasons for believing that statement to be true and absolutely none for believing it to be false and it has been accepted as true by the Judge of the lower appellate Court. The finding that due execution of the mortgage-bond has been proved must therefore stand.

(1) [1887] 11 Bom. 690.

The defendants have also appealed against the decision of the lower appellate Court that the plaintiff is entitled to a decree for sale on the mortgage contending that it is a usufructuary mortgage and the plaintiff is entitled only to remain in possession until they choose to redeem which they can do at any time on payment of Rs. 900. The question is an open one, but the plaintiff is willing to concede the point for the purposes of this case provided that the question of his right to sue for sale hereafter, if he should desire to do so, is not thereby made res judicata and that this right to retain possession till redemption which the defendants admit, is clearly stated. He has in fact realized that his suit was ill advised as the right to possession of the land is worth now a great deal more than Rs. 900, and the property is not transferable except under his mortgage being an occupancy holding. To force a sale and obtain repayment of his debt would be entirely against his own interest, but having once launched the suit he was of course bound to appeal against the finding of the first Court that the mortgage bond was never duly executed. It appears that on that finding the defendants were foolish enough to take forcible possession of the holding and that the plaintiff has now recovered possession by a suit under the Specific Relief Act and has also recovered Rs. 140 as mesne profits. On the announcement of the decision that the mortgage bond was duly proved the parties have agreed that the decree of the lower appellate Court shall be set aside and that in lieu thereof a decree shall issue declaring that the mortgage bond in suit was duly executed and that the plaintiff is entitled to hold possession of the mortgaged property till redemption and ordering that each party shall pay its own costs throughout. A decree will issue accordingly.

P.N./R.K. *Decree accordingly.*

END

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TO

THE LEGAL PROFESSION

IN GRATEFUL RECOGNITION OF

THEIR WARM APPRECIATION AND SUPPORT

OUDH JUDICIAL COMMISSIONER'S COURT

1914

Judicial Commissioner :

Mr. Benjamin Lindsay, J. P., I. C. S.

Additional Judicial Commissioners :

Rao Bahadur Pandit Kanhaiya Lal, M.A., LL. B.

Mr. Stuart.

" Kendall.

THE

ALL INDIA REPORTER

1914

OUDH J. C's. COURT

NOMINAL INDEX

Absence of Star denotes Cases of Provincial or Small Importance.
*** Indicates Cases of Great Importance.**
*** * Indicate Cases of Very Great Importance.**

A

Abbas Quli Khan v. Emperor 275
Abdul Basit v. Abdul Salam 183
Abdul Basit v. Khoda Bakhsh 335
Abdul Rahman v. Kale Khan 165
Ahemadi Begam, Mt. v. Raja Udit Narain Singh 392
Ajudhya Pershad v. Mahabir Pershad 162
Alauddin Khan v. Emperor 406
Allahabad Bank, Ltd., Lucknow v. Suraj Kuar 289
Amar Chand Pal v. Secretary of State 423
Angad Das v. Mt. Ghasiti 237
Aparbal Singh v. Narpat Singh 42
Asghari Khanam v. Raj Bibi 111
Azizulhak v. Mt. Mariyam Bibi 369

B

Baij Nath v. Emperor 329
Bakkha Singh v. Gaya Din Singh 405
Baldeo Prasad v. Chet Ram 366
Balwant Singh v. Emperor 204
Bandi Din v. Dharammangal Singh 25
Bans Gopal Pande v. Emperor 398
Basant Singh v. Mata Bakhsh Singh 330
Beni Madho v. Ram Harakh 265 (1)
Bhagwati Prasad Singh v. Parmeshar 251 (1)
Bhagwati Prasad Singh v. Ram Jiwan 127
*Bharath Singh v. Dharam Singh 147
Bhola v. Sheo Darshan Singh 221
Binda Parshad v. Ram Bhajan 255 (1)
Bisheshar Bakhsh Singh v. Debi Bakhsh Singh 245
Bismillah Begam v. Shahar Bano Begam 131

C

Chet Kunwar, Mt. v. Puttu Singh 327
Chhote Lal v. Badri Singh 109
Chiranji Lal v. Biswa Nath 208

D

Dal v. Emperor 414
Daljit v. Ram Rattan 146
Data Ram Tewari v. Deokali Tewari 360
Debi Dayal v. Emperor 193
Deputy Commissioner, Bahraich v. Raja Ram 387
Deputy Commissioner, Fyzabad v. Sant Bakhsh Pathak 333
Deputy Commissioner, Lucknow v. Sukhnandan 251 (2)
Dhondekhan v. Thakurain Har Nath Kunwar 419
*Dilipat Singh v. Kashi Nath 149
Durga v. Man 243
Durga Singh v. Muhammad Raza Husain Khan 379

E

Emperor v. Bithal Nath 230
Emperor v. Mt. Jadi 367

F

Farzand Ali Khan v. Mir Amir Haider 384
Fida Husain v. Collector of Shahjahanpur 322

G

Gajja v. Emperor 285
Ganga Prasad v. Subhag Chand 280
Ganga Sahai v. Emperor 114
Gauhar, Mt. v. Emperor 381
Gaya Din Singh v. Har Karan Singh 23
Gaya Din Upadhya v. Triloki Nath Singh 113
Ghazanfar Husain v. Ram Ratan 307
Girdhari Lal v. Damodar Das 430
Gopal Singh v. Karan Singh 160
Govind Prasad v. Ganga Prasad 411
Gur Narain v. Gulzari Lal 310
Gur Sahai v. Muhammad Abul Hasan Khan 187

H

Hasibunnissa, Mt. v. Mt. Mahmudunnissa 383
Hazari Lal v. Ram Narain 363
Hubdar Khan v. Gajadhar Chaube 283

I

*Imamuddin v. Mt. Mumtazunnisa 339
Inayat Ullah v. Amanat Husain 31
Indal Sah v. Bhabhuti Singh 220 (2)
*Indar Dat v. Emperor 345
Iqbal Narain v. Suraj Narain 231

J

Jagan Nath v. Emperor 126
Jagannath v. Emperor 182
Jagannath v. Kedar 228
Jagmohan Singh v. Tula Ram Das 247
Jai Dayal v. Brij Nath Prasad 223
Janki v. Behari Lal 130
Janki Kunwar v. Narendra Bahadur Pal Singh 18

Jhandeshur v. Baij Nath 425
*Jokhan Singh v. Deputy Commissioner, Fyzabad 246

K

Kailasa, Mt. v. Raghubar 374
Kali Pershad v. Mt. Thakur Dei 343
Kanchan Kunwar v. Amar Singh 296
Kandhai v. Emperor 194
Kesri Mal v. Emperor 361
Kifayat Ullah v. Mahabir Prosad 426
Kishan v. Raj Bahadur 313
Kishan Lal Atal v. Ummatulfatima Begam 233

L

Lachchu v. Emperor 171
Lachhmi Narain v. Ram Dayal 144
Lachman Das v. Narain 278
Lala Singh v. Hazari Singh 417
Lal Bahadur v. Sheo Narain Lal 95
Lal Hanwant Ram v. Raja Muhammad Abul Hasan Khan 328
Lalji v. Ganga Prasad 308
Lalla v. Emperor 167 (1)
Lalman v. Nand Lal 123
Lal Sripat Singh v. Lal Basant Singh 213
Lalta Pershad v. Majidunnissa 154

M

Madari Singh v. Ram Ratan 189
Mahabir Bakhsh Singh v. Sheoraj Singh 41
Mahadei Kuar, Mt. v. Sant Bakhsh Singh 421
Mahadeo Singh v. Jagmohan Singh 235
Maharaj Singh v. Lachhman Das 184
Mahomed Abdul Raqib Khan v. Salamat Bibi 100
Mahomed Ali Khan v. Lalta Singh 218
Mahomed Ali Muhammad Khan v. Emperor 272(1)
Mahomed Husain v. Lalji Singh 44
Mahomed Nasim v. Muhammad Ahmad 408
Mahomed Raza v. Mt. Barka 220(1)
Mahpal Singh v. Emperor 205
Mahraja, Mt. v. Mt. Sukhrani 397
Malik Husain v. Emperor 32
Mamola v. Kedar Nath 234
*Mata Din v. Ahmad Ali 140
Matai Singh v. Ajudhya Singh 273
Mendana v. Jagan Nath Bakhsh 326
Merha, Mt. v. Kundan Lal 399
Miro, Mt. v. Lachhman Prasad 348
Mir Syed Hasan v. Mt. Taiyaba Begam 52
Moti Singh v. Prithipal Singh 164
Mukhtar Ahmad v. Barati Lal 115
Muneshar Bakhsh Singh v. Mt. Phul Kuar 268
Munifa Bibi, Mt. v. Fateh Ali 167(2)

N

Nanhe Mal v. Emperor 386
Narain Singh v. Shiam Kali Kunwar 315
Narindra Bahadur Singh v. Haji Abdul Haq 206
Niamat Khan v. Deputy Commissioner, Kheri 293

O

Onkar Singh v. Bhagwan Dat Singh 238
Ori Lal v. Muhammad Yakub 286

P

Parbhu Dayal v. Babban Lal 349
Piare Lal v. Mahammad Mahmad 359
Prag v. Raja Muhammad Abdul Husain Khan 190
Prem Narain v. Ram Lal 314
Prins, E. G. A. v. Murray & Co., Ltd. 199
*Punni, Mt. v. Chet Ram 265(2)
Puttu v. Emperor 388

R

Raghu v. Emperor 412
Raghunath Dass v. Randhir Singh 103
Rahas Behari Lal v. Bachchu Singh 137
Raja Ram v. Itraj Kunwar 270
Rajman v. Brahm 391
Ram Adhin Misra v. Sitla Bakhsh Singh 304
Rama Shankar v. Nanik Prasad 352
Ram Bakhsh v. Chhote 148
Ram Dat v. Sukhia 336
Ram Dayal v. Sarju Prasad 282
Ram Din v. Kayesth Pathshala, Allahabad 291
Rameshar Bakhsh Singh v. Sankata Bakhsh Singh 37
Ram Jiyawan v. Mohammad Abdul Hassan Khan 118
Ram Nath v. Bindeshuri Prasad Singh 269
Ramphal v. Emperor 264
*Razawand Singh v. Dukchhor 216
Rudra Pratab Singh v. Raghuraj Gir 244
Rustam Singh v. Emperor 176

S

Sadik Husain Khan v. Hashim Ali Khan 416
Sadiq Husain v. Secy. of State 272(2)
Saheb Din v. Jang Bahadur Singh 410
Sajjad Ali Khan v. Secy. of State 201
Sanai Pershad v. Balak Ram 241
Sankatha Prasad v. Raja Krishna Dat Singh 125
Sanwal Singh v. Bhikhari 248
Sanwal Singh v. Prag Dut 306
Sarabdawan Singh v. Emperor 222
*Sardar Singh v. Gaja Singh 212
Sardha Baksh Singh v. Durga Baksh Singh 104
Sarju Prasad v. Emperor 262
Shahamat Khan v. Gulab Khan 407
Sheo Bakhsh Singh v. Mt. Umeda 106
Sheo Dat Singh v. Mt. Sidhao Kunwar 357
Sheo Dulare Misra v. Brij Bhukhan Lal 353
Sheonatha, Mt. v. Sheoraj Singh 338
Sheo Singh v. Emperor 305
Shivnath Singh v. Manohar Lal 107
Sita Ram v. Haidar Khan 341
Sitaramji v. Jadunath Singh 255(2)
Som Nath v. Ram Bilas 332
Sri Krishna Lal v. Ghulam Subhani 174
Subhadra Kuar v. Bireshwar Prasad 303
Sukhnandan v. Lachman Prasad 396
Suraiya Qadr v. Qudsia Begam 1
Suraj Bakhsh v. Chhab Kuar 318
Suraj Baksh Singh v. Raghubar Singh 385
Surajpal Singh v. Gajraj Singh 324
Surat Singh v. Emperor 185

T

Thakur Das v. Emperor 225
Tirbhuwan Bahadur Singh v. Mukta Prasad 157

U

Ubaid Ullah Khan v. Nazir Husain Khan 378

V

Vidyasagar v. Ratipal 209
Vishnunath Kuar v. Ladli Prasad 299
Vishunath Kuar, Mt. v. Gauri Shankar 413

Z

Zahid Ali v. Kedar Nath 376

S. N. DAR, B.
Vakil High Co
SRINAGAR (Kas

THE

ALL INDIA REPORTER

1914

OUDH J. C's. COURT

SUBJECT INDEX

Absence of Star denotes Cases of Provincial or Small Importance.
*** Indicates Cases of Great Importance.**
*** * Indicate Cases of Very Great Importance.**

A

Adverse Possession

——Equity of redemption—Adverse possession over a right of equity of redemption can legally exist . **283***a*

——Burden of proof of exclusive title against joint owner is in person alleging **228***b*

Arbitration

——Party cannot resile from reference to arbitration **327***a*

——Right of parties—Award stating *A* and *B* to be owners in equal shares of property under award—*B* to remain in possession of whole and pay as profits certain sum to *A*—Relinquishment by *A* of every right except profits—*A* held to have consented to limit his claim as to profits only **109***a*

Arms Act (11 of 1878)

——**Ss. 4** and **20**—Definition of "arms" is not exhaustive—Weapon sufficient to cause death does not alone make it "arms"—Removable blade attached to lathi does not make it "arms" **285**

——**Ss. 20** and **4**—Definition of "arms" is not exhaustive—Weapon sufficient to cause death does not alone make it "arms"—Removable blade attached to lathi does not make it "arms" **285**

B

Bengal Alluvion and Diluvion Regulation (11 of 1825)

——Riparian owners in Fyzabad District—Ikrarnamas about accepting custom of dhardhura if not entered in Record of Rights are not adequate proof of custom **18**

C

Civil P. C. (14 of 1882)

——Words "Married woman" do not apply to widow **310***b*

——**S. 443**—Appointment of guardian ad litem is function of Court **107***b*

——**S. 443**—Minor—Minor should be allowed benefit of doubt in questions of procedure **107***c*

——**(5 of 1908)**

* ——**S. 2** and **O. 20, R. 14**—Pre-emption decree on default of payment on due date becoming decree for dismissal—Appeal lies **147***a*

——**S. 2, Cl. 11**—Zamindar taking property by escheat is not legal representative of deceased judgment-debtor **208**

——**S. 11**—Permission to withdraw suit to file fresh one—Res judicata cannot be pleaded—Civil P. C., O. 23, R. 1 **234***a*

——**S. 11**—Custom not established in previous suit because of negligence in production of evidence—Question of custom is not res judicata in subsequent suit **25***d*

——**S. 20 (c)**—"Cause of action" explained—The term "cause of action" comprises every fact which is material to be proved to entitle the plaintiff to succeed and includes an assertion of the right infringed, and of the manner in which the infringement is made **314***a*

——**S. 20 (c)**—Place of business gives jurisdiction for suit for rendition of partnership accounts as carrying on partnership business is main cause of action—Account books kept at different places does not affect jurisdiction **314***b*

Civil P. C.
——**S. 20 (c)**—Place of business gives jurisdiction for suit for adjustment of partnership accounts—Place where contract entered into does not affect **314***c*
——**S. 34**—Unconscionable charge of interest amounting to clog—Courts can allow lower rate—Interest **23***c*
——**S. 35**—Costs are discretionary—Order should not be interfered with in appeal unless grossly unjust **231***a*
——**S. 35**—Court-fee on part of claim withdrawn cannot be included in costs **118***f*
——**S. 47** and **O. 21, R. 53**—Refusal of attachment of a joint decree in favour of judgment-debtors and others is not appealable under S. 47 **359***a*
——**S. 47** and **O. 20, R. 14**—Question whether payment is made within time or not does not fall under S. 47 **147***b*
——**S. 52** — Decree-holder cannot be entitled to rents and profits of deceased's property until sequestration by attachment or otherwise—Profits before sequestration are not assets of deceased **233**
——**S. 60 (i)**—Honorary commissioned medical officer's pay is attachable - S. 144, Army Act, is no bar **199***a*
——**S. 60 (2) (b)**—S. 60 (2) (b) does not declare that regular force officer's pay is not attachable under S. 60 (1) **199***b*
——**S. 65** and **O. 21, R. 94**—Sale certificate is not essential for purchaser's title **306**
——**S. 92**—De facto trustee or trustee de son tort can be sued under S. 92 **408***a*
——**S. 92**—Strangers cannot be sued under S. 92 **237**
——**S. 100**—Finding of fact though erroneous cannot be disturbed in second appeal if prescribed procedure is followed **228***a*
——**S. 100**—Whether property is talukdari or not is question of law **206***a*
——**S. 100**—Existence of custom is question of fact—Whether proof sufficient or not is question of law **123***a*
——**S. 100** — Credibility of witnesses cannot be considered—Finding based on inadequate evidence or proper evidence disallowed—Finding can be interfered in second appeal **123***c*
——**S. 109 (c)**—Order refusing to set aside dismissal for default affirmed in appeal but set aside in revision—Leave to appeal to Privy Council was not granted, order in revision being challangeable in appeal in regular suit **223**

Civil P. C.
——**S. 109, Cl. (a)** — Order rejecting review cannot be regarded as an order appealable under Cl. (a), S. 109 **41**
——**S. 115** and **O. 47, R. 1**—Where appellate Court's unexecutable decree is refused to be executed by lower Court, correct remedy is to apply for review of appellate decree and not revision against lower Court's refusal to amend—Time spent in trying to execute decree can be allowed under Limitation Act, S. 5 **332***c*
——**S. 148**—Time cannot be extended in pre-emption decree **383**
——**S. 151**—Appellate Court's decree cannot be amended by lower Court **332***b*
——**O. 6, R. 5**—Object of, explained—Vague pleadings should be asked to be made specific **52***d*
——**O. 7, R. 1**—Manager suing or sued—He may not be described as such **353***c*
——**O. 7, R. 14**—Party is bound by documents filed with plaint or written statement unless shown to be filed by bona fide mistake **357**
——**O. 9, R. 13**—Application by surety alone—Decree against both can be set aside **220 (1)**
——**O. 14, R. 5**—Court can amend issue even after case is closed and can give opportunity for additional evidence—Omission to frame specific issue is not bad if issues framed are wide enough **255 (2)***a*
——**O. 20, R. 13**—Administration suit—Court can demand security for due performance of funeral rights and expenditure of money allotted for it **1***k*
——**O. 20, R. 15**—Preliminary decree is not obligatory—But passing preliminary decree for determining points agreed is bad **399***b*
——**O. 20, R. 18 (2)**—Final decree in case of properties assessed to revenue is not contemplated—Duty of civil Court is to declare shares and give directions to revenue Court to effect partition **332***a*
——**O. 21, Rr. 19** and **20** — Costs awarded to mortgagor can be set off against mortgage money—R. 19 does not prescribe parties or remedies to be similar **416**
——**O. 21, R. 53** — Refusal of attachment of a joint decree in favour of judgment-debtors and others is not appealable under Civil P. C. (1908), S. 47 -

Civil P. C.

——**O. 21, R. 53**—R. 53 refers to stage of execution of attached decree and not where attachment is refused **359***b*

—— **O. 21, R. 54**—Alienation is not invalid unless attachment is effected or all preliminaries under R. 54 are complied with—Paying of process-fee is not sufficient **308***a*

——**O. 21, Rr. 62** and **60**—Purchaser subject to mortgage will not be bound by mortgage debt if allowed to be barred by time **251(2)***b*

——**O. 21, Rr. 69 (2)** and **90** — Absence of fresh proclamation is mere irregularity not vitiating sale unless injury is caused **164**

——**O. 21, R. 90**—Not showing auction-purchaser as non-applicant is not material defect **307**

——**O. 21, R. 94** and **S. 65**—Sale certificate is not essential for purchaser's title **306**

——**O. 22, R. 3**—Right to sue as pauper is personal—Legal representative cannot continue in forma pauperis — He may apply afresh **384**

——**O. 22, R. 9** — Mere statement of ignorance of death of principal respondent is not sufficient to set aside order of abatement of appeal particularly when they resided at no great distance and it was appellant's duty to keep informed **411**

——**O. 23, R. 1** and **S. 11**—Permission to withdraw suit to file fresh one—Res judicata cannot be pleaded **234***a*

——**O. 23, R. 3** — Joint Hindu family manager is competent to compromise if it is for benefit though it can be set aside for fraud **353***b*

——**O. 26, R. 14** — Difference between commissioner and arbitrator pointed out **183***a*

——**O. 26, R. 14** — Compromise decree stipulating that on failure of parties to make partition person named should effect it—Person held to be commissioner and not arbitrator and objection to his report were tenable **183***b*

——**O 32, Rr. 3** and **4** — Appointment of guardian without notice to minor and proposed guardian is irregular—Minors in such cases cannot be proceeded ex-parte **328**

——**O. 32, R. 7** — Compromise decree cannot be set aside until fraud or collusion on part of next friend or gross negligence of guardian ad litem is established **162***a*

——**O. 32, R. 7** — Compromise entered into with consent of Court cannot be set aside unless consent obtained by fraud or concealment of material facts **162***b*

——**O. 34, R. 1** — Revision lies from order making person claiming paramount title party in mortgage suit **184***a*

——**O. 34, R. 1**—Person claiming paramount title cannot be joined in mortgage suit **184***b*

——**O. 34, R. 2**—Decretal amount can be paid until final decree is passed—Such payment is not governed by Limitation Act, Arts. 181, 182 or 183 **209**

——**O. 34, Rr. 4** and **6** — Preliminary decree should ordinarily be under R. 4—But where combined with one under R. 6 also application for separate decree is superfluous **333***a*

——**O. 34, R. 6**—Relief against defendant includes relief against any property in his possession **333***b*

——**O. 34, R. 6** — Fresh decree when not necessary stated **245***a*

——**O. 39, R. 1**—Application for injunction in suit for declaration that property notified for sale was joint — Decree-holder opposing and declaring property as talukdari — Case held fit for injunction **206***b*

——**O. 41, R. 17** — What amounts to dismissal under R. 17 stated — Appeal dismissed for appellant's default but not on merits — Cross-objections however decided — Procedure held to be wrong **303**

——**O. 41, R. 25** — Trial on issues in lower Court — Remand order by appellate Court for trial of same issues with direction to call particular evidence is improper **103**

——**O. 41, R. 27**—Shifting of onus is no ground for allowing additional evidence in appeal if party is not taken by surprise **44***e*

——**O. 41, R. 31**—Appellate Court's judgment stating that it is in complete agreement with findings of trial Court is not sufficient **265 (1)**

——**O. 47, R. 1**, and **S. 115**—Where appellate Court's unexecutable decree is refused to be executed by lower Court, correct remedy is to apply for review of appellate decree and not revision against lower Court's refusal to amend—Time

Civil P. C.
spent in trying to execute decree can be allowed under Limitation Act S. 5 **332***c*
*——**Sch. 2, para. 14**—Award can be oral but unless made rule of law does not operate to transfer property **149***c*
——**Sch. 2, para. 16 (2)**—No appeal lies against award decree except when it is in excess or not in accordance with award **327***b*
Contract Act (9 of 1872)
——**S. 16**—Validity of sale of claim under litigation should not be judged by value of claim as decreed but according to circumstances before decree—Petition writer selling his share of litigation held not unduly influenced **299**
——**S. 23**—Lease for farm and sale of drugs—Agreement by lessee to transfer portion of profits or losses from lease—Government recognizing only man in whose name lease stands—Contract to divide risks held not illegal **399***a*
——**S. 23**—Agreement to stifle prosecution for offence of public nature is illegal—Private injury caused—Agreement to withdraw can be enforceable—Promise to withdraw noncompoundable offence cannot be enforced **278**
——**S. 53**—Person making performance impossible—Other party must be restored to status quo ante **109***b*
Contribution
——Suit for—Defendant is not exempt on ground that right of original creditor had become time barred **104***a*
Cosharer
——Rent — Arrangement between cosharers amounting to division—Payment of rent to one under whom tenant holds is valid dicharge **421***c*
——Lambardar—Reasonable cost of collection stated—Lambardari *haq* does not include cost of collection **231***b*
Court-fees Act (7 of 1870)
——**S. 7 (4) (f)**—Administration suit—Accounts demanded—Court-fee is payable on value of relief in suit—Court can ask after determination deficit court-fee—Court-fees Act (1870), S. 11. **1***l*
——**S. 11**—Court-fees Act, S. 7 (4) (f)—Administration suit—Accounts demanded—Court-fee is payable on value of relief in suit—Court can ask after determination deficit court-fee **1***l*
——**Sch. 2, Art. 17 (3)**—Mortgage suit for sale—Decree against some property only—Appeal for declaration that other property also should be held liable and not for mortgage money—Court-fee held to be payable on value of property sought to be made liable **396**
Criminal P. C. (5 of 1898)
*——**Ss. 16, 350** and **537**—Presence of each Magistrate at hearing of evidence is not essential—Local Governmsnt or District Magistrate can lay down rules for trials before Bench of Honorary Magistrates—Test of validity of judgment is whether substantial justice is done—Two out of three Magistrates delivering judgment present on every hearing and one only for some hearings—Irregularity is curable by S. 537 **345***a*
——**Ss. 35** and **423**—Aggregate sentence passed by Magistrate for two offences one triable exclusively by Sessions—Appellate Court apportioned sentence—Conviction for offence triable by Sessions was set aside **361***c*
——**S. 35**—Concurrent sentences—Power of passing, is confined to cases where person is convicted at one trial of two or more distinct offences **193**
——**Ss. 107** and **125**—No appeal lies against order under S. 107 to District Magistrate—Revision lies to Sessions Judge **305***a*
——**Ss. 114** and **288**—Statements taken under S. 164, but not covered by S. 288, are not admissible except to contradict witnesses under Evidence Act, S. 145 and 155 **388**
——**Ss. 125** and **107**—No appeal lies against order under S. 107 to District Magistrate—Revision lies to Sessions Judge **305***a*
——**S. 145**—Question of possession and not of title has to be inquired into **31***a*
——**S. 146**—Attachment of property cannot be ordered before inquiry under S. 145 is completed **31***b*
——**S. 162**—Evidence Act (1 of 1872), S. 27—Confession to investigating police officer is not admissible—He should not be allowed to depose it **32***a*
——**S. 164**—Essentials to ascertain that confession is free stated—Recording of comprehensive question alone is not sufficient—Magistrate must satisfy himself about confession being voluntary—Confession retracted and inconsistent with medical evidence was not relied upon **194**

Criminal P. C.
——**S. 195**—Sanction can be used only once **264***b*
——**S. 195**—Great delay is fatal to grant of sanction **148**
——**S. 235**—Test of determining whether several offences form one transaction explained **275***b*
——**S. 239**—Joinder of various offences such as transportation of opium, possession of opium and selling of opium not against all accused and not committed in same transaction held illegal **171***a*
——**Ss. 239** and **537**—Misjoinder in violation of S. 239 cannot be cured—Trial is void **171***b*
——**S. 259**—Fresh complaint under S. 211, I. P. C., first being dismissed in default does not lie—Order of dismissal under S. 259 held to be wrong—S. 259 relates to compoundable cases **264***a*
——**S. 342**—S. 342 applies to proceedings before Magistrate, even cases triable by Sessions Court—Scope of S. 342 explained—Replies by accused can be used against him but their admissibility is not governed by S 27, Evidence Act—Question of inquisitorial nature cannot be asked **32***b*
——**S. 345**—Permission for compounding can be granted in revision **167(1)***a*
——**S. 345**—Permission should not be refused on ground that complainant's master is unwilling **167(1)***b*
——**Ss. 350, 537** and **16**—Presence of each Magistrate at hearing of evidence is not essential—Local Government or District Magistrate can lay down rules for trials before Bench of Honorary Magistrates—Test of validity of judgment is whether substantial justice is done—Two out of three Magistrates delivering judgment present on every hearing and one only for some hearing, the irregularity is curable by S. 537 **345***a*
——**S. 350**—Magistrate deciding case need not have heard all evidence **345***b*
——**Ss. 403** and **437**—Fresh complaint when accused discharged without enquiry is tenable **406**
——**Ss. 423** and **35**—Aggregate sentence passed by Magistrate for two offences, one triable exclusively by Sessions—Appellate Court apportioned sentence—Conviction for offence triable by Sessions was set aside **361***c*
——**S. 435**—High Court can call for record only under S. 435 and that too from inferior criminal Court **225***d*
——**S. 435**—Order of Collector under Income-tax Act, S. 36, arising out of proceeding pending before another officer does not fall within S. 435 **114***a*
——**Ss. 437** and **403**—Fresh complaint when accused discharged without inquiry is tenable **406**
——**S. 439**—Irregularity of procedure cannot be pleaded for the first time in revision **345***c*
——**S. 439**—Revision admitted must be decided on merits **305***b*
——**S. 439**—Question of fact—In criminal revisions, the High Court does not ordinarily consider questions of fact, except where the matter has been before only one Court below **305***c*
——**Ss. 439** and **476**—Order under S. 476 by civil Court cannot be revised under Criminal P. C., S. 439 **225***a*
——**Ss. 439** and **437**—Summoning of record is necessary preliminary **225***b*
——**S. 439**—S. 439 is not independent of S. 435 **225***c*
——**S. 476**—Execution proceedings are judicial for purpose of S. 476 **407**
——**S. 476**—Order under S. 476 by civil Court cannot be revised under Criminal P. C., S. 439 **225***a*
——**S. 476**—Civil or revenue Court making inquiry under S. 476 is not criminal Court **225***f*
——**S. 483**—Specific Relief Act (1 of 1877), S. 42—Suit for declaration that defendant 2 is not illegitimate son of plaintiff from defendant is tenable when order for maintenance is passed under Criminal P. C., S. 483 **374**
——**S. 488**—Divorce annuls maintenance order **367**
——**S. 526**—Prosecution initiated by District Magistrate—Deputy Magistrate important prosecution witness—Case should be transferred **398**
——**Ss. 537, 350** and **16**—Presence of each Magistrate at hearing of evidence is not essential—Local Government or District Magistrate can lay down rules for trials before Bench of Honorary Magistrates—Test of validity of judgment is whether substantial justice is done—Two out of three Magistrates delivering judgment present on every hearing and one only for some hearing—Irregularity is curable by S. 537 **345***a*

Criminal P. C.

——S. 550—Police Sub-Inspector suspecting logs on railway trucks to be stolen property directed station master to detain them—Order held to be irregular, seizure under S. 550 being necessary—Logs detained for some time and forwarded as per orders of Traffic Superintendent—Station master held not guilty under Penal Code (1860), S. 188 **230**

Criminal Trial

——First information report is no evidence of facts mentioned therein **414***a*

——Confession not recorded by Magistrate but made to prosecution witnesses can be accepted with caution **361***a*

——Conviction on suspicion is bad **275***c*

——Conviction without certainty of guilt is bad **262***b*

Custom

——Proof of—One instance can never suffice to prove a custom **336***d*

——Proof—Wajibularz— Wajibularz is good proof of custom unless entry is only expression of views and not record of existing fact **318***c*

——Proof—Substantial corroboration is required when custom is at variance with law **318***d*

——Proof—Entries in Wajibularz signed and verified by ancestors is good proof of custom **265 (2)***b*

——Custom overrides law when proved and is not grossly repugnant—Essentials of custom stated **265 (2)***c*

——Proof—Entries in Ikrarimalikanedeh about village custom are binding in absence of fraud though not made in presence of parties—Citing of instances is not indispensable **241***a*

——Proof— Previous decision allowing pre-emption—Absence of custom being not alleged is no proof of custom allowing pre-emption **165***b*

——Evidence of—Essentials to establish custom stated **123***b*

——Family— Proof — Wajibularaiz of other villages of persons of same clan held not proper evidence to prove family custom **123***d*

——Evidence—Existence of custom in one place does not justify presumption that it exists in same people settled in another place **100***a*

——Succession—Exclusion of daughters amongst Thakurs of Oudh is common **25***b*

——Family—Oral evidence of witnesses not belonging to family has no weight **25***c*

D

Decree

——Construction—Descriptions of property conflicting — In determining to which property decree refers, record of the case can be referred to—Mode of construction stated **280**

——Construction— Maintenance decree providing for realization is not only declaratory but executable **268**

——Construction—Decree might be construed in light of judgment **245***b*

——Construction—Condition of restraint of alienation of absolute estate contained in settlement is not binding **213***c*

——Setting aside — Fraud — Plaintiff's knowledge of falsity of his claim estops him from denying fraud in suit by defendant for setting aside ex parte decree obtained by former **189**

Deed

——Construction—Intention is to be gathered not from title but from terms and surrounding circumstances **366***a*

——Construction — Deeds forming one transaction can be referred for construing other **255 (2)***b*

——Construction — Compromise conferring right to enjoy profits of village in perpetuity with no reservation of resumption or enhancement of rent—Absolute under proprietary rights held conferred in spite of settlement decree containing contrary clause **213***d*

E

Ejectment

——Claimants of under proprietary rights paying nazranas to landlords cannot be ejected through civil Courts **157***h*

Evidence

——Criminal Trial—Incriminating statement by accused soon after occurrence raises reasonable presumption of guilt **414***d*

Evidence Act (1 of 1872)

——Ss. 11, 18, 19 and 21—Evidence of conduct and statement about deed of adoption, of which deceased is alleged to have become aware after execution, and before death is perfectly relevant **52***l*

——S. 18 — Statement by party or pleader in prior suit is admissible to prove or disprove plaint in subsequent suit **318***a*

——Ss. 18 and 19—Admissions against interest are conclusive unless circumstances exist discounting value of admissions **52***n*

Evidence Act
——**S. 25**—Village chaukidars—Village chaukidars are police officers within the meaning of S. 25 **414***b*
——**S. 25**—Confession to strangers—An accused's confession to some person although made in the presence of a police officer is nevertheless admissible in evidence **414***c*
——**S. 27**—Confession to investigating police officer is not admissible — He should not be allowed to depose it—Criminal P. C. (1898), S. 162 **32***a*
——**S. 32**—Statements in Ikrarimalikanedeh are admissible **241***b*
——**S. 32 (5)**—Pedigree held to be admissible and relevant **291***c*
——**S. 32 (5)** — Hearsay evidence of fosterage is not admissible **1***f*
——**S. 33**—Evidence of one defendant does not operate against co-defendant **291***d*
——**S. 33**—Deposition of deceased made reluctantly though irrelevant in that case is good evidence in subsequent case if not suspected to be false **1***a*
——**Ss. 34** and **39**—Evidence of statements made by deceased about execution of will is admissible **52***k*
——**S. 35**—Endorsement by registering officer about age is not couclusive proof of age as that officer is not bound to record age—Registration Act (16 of 1908), S. 35 **44***c*
——**S. 35**—Khewat entries are relevant to prove legitimacy **42***b*
——**S. 45**—Opinion—No attention can be paid to the mere statement of opinion of witness **291***e*
——**S. 45**—Similarity of handwriting may be corroborative—But conviction for forgery cannot be based on it—Penal Code (45 of 1860), S. 465 **275***a*
——**S. 65**—In redemption suit mortgagors relied on secondary evidence of mortgage without proving that mortgage was subsisting—Mortgagors held could not succeed—Mortgage **293***a*
——**S. 92**—Extrinsic evidence of what they did and not what they intended can be given to show real nature of transaction. **335**
——**S. 92**—Oral evidence contradicting registered document should not be allowed unless truth of execution is suspected **52***m*
——**S. 101**—Party accepting burden of proof is estopped from pleading that burden was wrongly placed **341**

Evidence Act
——**S. 101**—Onus immaterial—Evidence recorded on clear issues—Question of misplacing burden of proof is immaterial in appeal—Pleadings can be treated as evidence **52***a*
——**Ss. 102** and **103**—Nature of burden of proof upon person putting forth document alleged to be revoking a will stated—He must prove not only execution but testamentary capacity of the executor **52***h*
——**S. 102**—Defendant pleading minority at the time of contract—Burden to prove majority is on plaintiff **44***b*
——**Ss. 112** and **114**—Presumption is in favour of legitimacy—Burden of proving illegitimacy is on person alleging **42***a*
——**S. 114**—Presumption of custom of alienation cannot arise merely from alienation by Hindu widow—Slight presumption may arise if alienation goes unchallenged and if not in favour of next reversioner **336***c*
——**S. 114**—Presumption regarding proceedings following judicial acts can be also made **308***b*
——**S. 114**—Scope of S. 114 pointed—It applies to analogous cases **176***b*
——**S. 114, Illus. (b)**—Conviction should not be based solely on evidence of witnesses suspected to be implicated **176***a*
——**S. 114 (g)**—Account books not produced though summoned—Adverse inference is justified — Careful money-lender not suing though amount rose much higher than mortgaged property during his lifetime, but leaving it to his successors, cannot be believed **154**
——**S. 115**—Purchasers cannot plead nontransferability **352***c*
——**S. 115**—Plaintiff's consent to mutation of property in defendant's name in revenue Court does not estop plaintiff from suing for possession of same property—Consent does not confer any title and can be withdrawn unless some obligation is attached—Mutation is no such obligation **343***a*
——**S. 115**—Previous admissions do not act as estoppel if they are shown to be not true or mistaken unless third person is prejudiced **318***b*
——**S. 115**—In dispute about rights of mortgaged properties mortgagor taking benefit under compromise in full settlement. was estopped from claiming redemption of mortgage **293***b*

Evidence Act
—— **S. 115**—Withdrawal of portion and acceptance of half in compromise in mutation proceedings does not operate as estoppel **235***c*
—— **S. 116**—Lessees are estopped from denying title of persons stepping into shoes of original lessor **157***g*
—— **Ss. 145** and **155**—Criminal P. C. (5 of 1898), Ss. 114 and 288—Statements taken under S. 164, but not covered by S. 288, are not admissible except to contradict witnesses under Evidence Act, Ss. 145 and 155 **388**
Execution—Suspension or postponement of application for, by order—Execution proceeding struck off—Application for continuation of suspended proceeding can be filed within three years from such order **430**
Execution Sale—Only half lien notified — Auction-purchaser cannot plead notification in suit for whole lien **137***b*

G

Guardian and Ward—Deputy Magistrate cannot conditionally order minors to be delivered to custody of guardian **329***c*
Guardians and Wards Act (8 of 1890), Ss. 11 (a), (4) and **47**—Person entitled to notice under S. 11 (a) but not made party cannot appeal under S. 47—He can apply in revision under Civil P. C., S. 115 **425***a*
—— **Ss. 13** and **17**—Any objection to grant of certificate of guardian can come under Ss. 13 and 17 **425***b*
—— **S. 17**—Maternal uncle is preferential guardian of person where paternal uncles claim adversely to minor **329***b*

H

Hindu Law
—— Adoption — A Brahmin boy cannot be adopted by a person of lower caste **315**
—— Alienation — Widow — Consideration left with purchaser to satisfy legal necessity—Purchaser failing—Necessity otherwise satisfied — Reversioner held entitled to claim possession without payment **296***a*
—— Alienation — Widow — Alienation partially for necessity can be avoided by reversioner on payment of, with interest, money spent for necessity **296***b*
—— Alienation — Widow — Custom recorded in Wajibularz giving authority to widow to alienate — Remainder goes to reversioner **265(2)***a*

Hindu Law
—— Debts—Father—Burden of proving immorality or illegality is on sons **310***c*
—— Family arrangement — What is family arrangement stated — Only pre-existing titles are recognized and no new titles derived **149***d*
—— Gift—Validity — Gift to idol is recognized by Hindu law—Gift is effective even if portion of income is reserved by donor — Property must vest in idol though management reserved **255(2)***f*
—— Gift—Idol — Property vests in idol from date of gift—Absence of mutation is immaterial **255(2)***j*
—— Joint family—Manager—Decree for or against manager binds family **353***a*
—— Joint family—Manager—Pre-emption—Decree obtained against local manager of joint Hindu family if not vitiated by fraud is binding on all members **353***d*
—— Joint family—Presumption of jointness is rebutted by separation of one member — Person alleging that others remained joint must prove it **324**
—— Joint family—Nucleus just sufficient for bare maintenance of family members living, earning and dealing separately—It cannot be presumed that they throw earnings into common stock **144**
—— Partition—Date of disruption cannot be presumed from proof of disruption **326***a*
—— Partition — No presumption that other members remained joint when one separated **326***b*
—— Partition — Separation of father while having his sons united is most unusual **109***d*
—— Religious endowment—Dedication—Mahant is not disqualified to acquire private property—Treatment of property determines nature of interest created—In absence of evidence that property was purchased from income of endowment or dedicated to it, held that it was not endowed **391**
—— Religious endowment—Idol is juridical person holding property like living person — Idol holds property through managers — No distinction exists between family and public idol **255(2)***c*
—— Religious endowment—Rule forbidding creation of perpetuity does not invalidate dedication to idol **255(2)***d*
—— Religious endowment — Idol consecrated — Deity resides therein **255(2)***e*

Hindu Law
—Religious endowment — Trustee has no beneficial interest in property gifted **255(2)***j*
—Religious endowment — Validity—Rule of succession under colour of fictitious endowment cannot be changed **255(2)***h*
—Religious endowment — Dedication reserving share of income for maintenance of family, reserving management subject to other's supervision and finally handing over management to Government is not fictitious but valid **255(2)***i*
—Reversioner — Reversioners must prove to be nearest reversioner **291***b*
— Widow—Right of survivorship between co-widows cannot be destroyed **149***a*
—Widow—Surrender must be of entire interest **149***b*
—Widow — Possessory mortgage for 50 years—Suit for possession by reversioners after widow's death — Reversioners held to be bound by mortgage to extent of mortgage-money found for legal necessity **113**
—Widow—Acquisitions out of income of husband's estate is presumed to be widow's property—Onus of proof that it is husband's property lies on reversioners **95**
—Widow — Widow after husband's death getting possession of proportionate share of family property—No allegation of permissive possession—Inference is that she succeeded to her husband's divided share **25***e*
—Will—Member of joint Hindu family is not competent to dispose of joint family property by will **310***a*

I

Income-tax Act (2 of 1886),
—**S. 36** — Criminal P. C., S. 435—Order of Collector under Income-tax Act, S. 36, arising out of proceeding pending before another offieer does not fall within S. 435 **114***a*
—**S. 36**—Collector is revenue Court **114***b*

Interest
—Rate — Seven and half per cent per annum simple held a moderate rate **289***a*
—Civil P. C., S. 34—Unconscionable charge of interest amounting to clog—Courts can allow lower rate **23***c*

Interpretation of Statutes
—Prccedure—Existing rules must be followed **125***b*

J

Jurisdiction
—Government's order of refusal to sanction sale in execution of mcrtgage decree, of rent free grant on ground of its inalienability challenged in suit—Though power to refuse sanction held could not be challenged in civil suit, declaration of inalienability could be—Civil Court held to have jurisdiction **423***a*
—Civil and revenue — Civil Court is competent to hold document false and invalid on which revenue Courts declared party perpetual lessee **419**
— Civil Court can entertain suits in which defendant does not admit tenancy but pleads some right adverse to proprietary interest of plaintiff **410**
— Civil and revenue—Partition vests title and civil Courts cannot go behind it **343***d*
—Civil Court has power to interpret settlement decree so as to make it comprehensible **213***b*
—Civil Court can inquire into proprietary right but not nature or terms of tenancy **190***a*
— Civil and revenue — Ejectment of lessee of village can be effected only by revenue Courts—Proprietary rights not put forth—Civil Court's jurisdiction is barred **187***a*
—Civil and revenue—Question of enhancement of rent or ejectmeut alternative are exclusively within revenue Court's jurisdiction — Opinions even should not be expressed by civil Courts **187***b*
—Civil and revenue—Civil Court can declare person to be tenant—Terms of tenancy may be left to revenue Courts **118***d*
—Civil court—Jurisdiction conferred by statute—Conditions must be strictly observed — U. P. Land Revenue Act (1907), S. 111 **115***a*

L

Lambardari
—Village profits—Nonproduction of account books—Onus of actual collection is on him **378***b*

Land Acquisition Act (1 of 1894)
—**S. 48**—Civil court can ignore circumstances affecting value not placed before acquisition officer **201***a*

Landlord and Tenant
—— Nontransferable holding — Holding declared nontransferable by settlement decree is not void but voidable **352***d*
—— Relation between subtenant and transferee of tenant-at-will is not of landlord and tenant—Transferee is not even agent of tenant as transfer is illegal **220(2)**
* —— Ejectment — Trees go along with holding unless custom to contrary — Trees when planted is immaterial **212**
—— Under proprietor—Permanent lessee not possessing heritable and transferable right is not under proprietor **190***b*
—— Ordinary tenant declared under proprietor by subsequent decision of revenue Court—Cause of action to annul entry arises from subsequent decision **118***a*
—— Ouster for five years does not affect lease under settlement Court decree if renewed in same terms **118***b*
—— Dahyak right without possession does not connote under proprietary right —Cash dahyak does not carry right to possession **118***c*
—— Dahyak right is transferable—Right to lease even if coupled with dahyak is not—Preferential right to lease does not confer under proprietary right—Effect of settlement Court's refusal to grant such settlement is absence of under proprietary right **118***e*
—— Lease providing for resumption on breach of condition does not create under proprietorship **37***b*

Limitation Act (15 of 1877)
—— Applicability — Act applies to appeals from decisions of Courts of revenue to District Judge **255(1)***a*
—— **Art. 144**— Applicability—Art. 144 applies to a case of adverse possession of the equity of redemption **283***b*

Limitation Act (9 of 1908)
—— **S. 4**—S. 4 applies to appeals under Oudh Rent Act (1886), S. 119-A **255 (1)***b*
—— **S. 5**—Civil P. C., S. 115 and O. 47, R. 1 — Where appellate Court's unexecutable decree is refused to be executed by lower Court, correct remedy is to apply for review of appellate decree and not revision against lower Court's refusal to amend—Time spent in trying to execute decree can be allowed under Lim. Act, S. 5 **332***c*
—— **S. 5** — Grant of incorrect copies by mistake is good ground for extension **146**
* —— **S. 6** — Assignee from minor does not get rights of his transferor — He must file suit within ordinary period of limitation **339**
—— **S. 12** — Applicabiiity — S. 12 does not require that application for copy should be made by party himself **244**
—— **S. 14**—Undervaluation not reckless or deliberate — Exclusion of time for proceeding in wrong Court held justified **282**
—— **S. 28** and **Art. 44**—Suit for possession of grove sold by guardian after three years of majority but before 12 years of sale is barred **338**
* —— **Arts. 10** and **120** — Pre-emption suit against first purchaser within year —Second purchaser joined after year — It was within time as Art. 120 and not Art. 10 applies to second purchaser **216**
—— **Art. 44** and **S. 28**—Suit for possession of grove sold by guardian after three years of majority but before 12 years of sale is barred **338**
—— **Art. 120**—Declaratory suit—Mutation refused in 1906 and even before this on ground that extent of share not ascertainable—Mutation effected with respect to half by compromise in 1910 — Suit for declaration of ownership of other half in 1911 held not barred **235***a*
* —— **Arts. 120** and **10** — Pre-emption suit against first purchaser within year —Second purchaser joined after year—It was within time as Art. 120 and not Art. 10 applies to second purchaser **216**
—— **Arts. 123** and **144** — Art. 123 applies to suit for share where defendant is bound to distribute but not to case of heir not so bound — Art. 144 applies in such case **369***a*
—— **Art. 142** — Suit for possession of land apart from houses or trees thereon is governed by Art. 142 **247**
—— **Arts. 144** and **123**—Art. 123 applies to suit for share where defendant is bound to distribute but not to case of heir not so bound **369***a*
—— **Art. 144**—Religious endowment—Possession of donor acting as muttawali becomes adverse to heirs from date of gift **255(2)***k*
—— **Art. 165**—Art. 165 covers all applications by judgment-debtors, e. g., application to set aside sale for possession of property sold but not included in mortgage and decree for sale **270**

Limitation Act
—— **Arts. 181, 182 or 183**—Civil P. C. (5 of 1908), O. 34, R. 2—Decretal amount can be paid until final decree is passed—Such payment is not governed by Limitation Act, Arts. 181, 182 or 183 **209**
—— **Arts. 182, 183 or 181**—Civil P. C. (5 of 1908), O. 34, R. 2—Decretal amount can be paid until final decree is passed—Such payment is not governed by Lim. Act, Arts. 181, 182 or 183 **209**
—— **Arts. 183, 182 or 181**—Civil P. C. (5 of 1908), O. 34, R. 2—Decretal amount can be paid until final decree is passed—Such payment is not governed by Limitation Act, Arts. 181, 182 or 183 **209**

M

Mahomedan Law
——Dower—Widow's possession in lieu of dower is not adverse—Widow's lien arises when possession is obtained not with force or fraud—What does not amount to fraud explained **369***b*
——Dower — Purchaser of husband's property but not widow's lien from widow cannot claim proportionate share of dower from heirs before decree for possession — He cannot also insist on widow being paid her dower before decree if she submits to decree **369***c*
——Dower—Wife is entitled to dower on husband's death—Consummation is immaterial—Marriage not repudiated—Full dower can be claimed **131***a*
——Dower—Marriage by sick man dying before consummation is void and wife cannot claim dower provided illness of husband continued without interruption from marriage till death—Mahomedan law—Marriage **131***b*
——Dower—Liabilities of deceased are irrelevant **131***c*
——Dower—Oudh Laws Act, S. 5—Property worth nine lakhs and dower fixed twenty-five lakhs—One lakh held to be reasonable dower **1***i*
——Dower—Court can award dower in lump sum in lieu of share of property to avoid disputes **1***j*
——Gift—Nature of possession for valid gift explained—Gift is not complete without possession **167(2)***a*
——Gift—Possession of part not delivered—Gift is valid with respect to property delivered **167(2)***b*
——Legitimacy—Circumstances and evidence of conduct necessary to prove legitimacy stated **1***b*
——Legitimacy — Legitimacy can be presumed from circumstances without proof of marriage—Presumption is rebutted if marriage is illegal **1***c*
——Legitimacy—Burden of proof—Person alleging illegitimacy must rebut presumption of legitimacy based on circumstances **1***d*
——Legitimacy—Proof—Written statement by mother showing invalidity of marriage does not affect proof of legitimacy of son from circumstances as proof of marriage is not required to prove legitimacy of child **1***g*
——Marriage—Dower—Marriage by sick man dying before consumption is void and wife cannot claim dower provided illness of husband continued without interruption from marriage till death **131***b*
——Marriage—Fosterage—Essential of establishing fosterage pointed out **1***e*
——Succession — "Habua" explained—Habua is taken by eldest child not as increment to his share but as mark of head of family—Eldest surviving son inherits habua and it passes to his heirs—Meaning of habua is restricted and is not enlarged by term expressed loosely **1***h*

Minor
——Minor should be allowed benefit of doubt in questions of procedure—Civil P. C. (14 of 1882), S. 443 **107***c*

Mortgage
——Mortgage of undivided share—Partition after execution of mortgagee's rights thereupon stated—Mortgagee has to accept partitioned share as security in place of undivided share—Mortgagee's right as to substituted security cannot be defeated by plea of bona fide purchase without notice—Specified plots mentioned in mortgage of undivided share not falling to mortgagor in partition—Entire partitioned share of mortgagor is to be looked to for security equal in value to that of specified plots **426***a*
——Decree on subsequent mortgage—Proper mortgages not mentioned in sale proclamation—Subsequent suit by prior mortgagee — Auction-purchaser cannot challenge validity of the mortgage **426***b*
——Interest—Fixed rate can be awarded after stipulated period until realization if rate reasonable—Court is competent to grant it under Civil P. C., S. 34 **289***b*
——Limitation—Puisne mortgagee has same limitation with respect to claim on basis of having redeemed prior mortgagee as prior mortgagee would have—Period

Mortgage
cannot be extended by fact of redemption **251 (2)***a*
——Interest— Stipulation to foreclose on default of payment of principal and interest—Post diem interest held payable **137***a*
——Co-mortgagors— Independent dealings of some mortgagors with mortgagee creating fresh right—Other mortgagors cannot be called to share liability **104***b*
——Collateral transaction between mortgagor and mortgagee on date of mortgage must be scrutinized carefully **23***b*

O

Opium Act (1 of 1878), S. 9—Opium found in house during absence of accused cannot amount to possession under the law **171***c*
Oudh Civil Digest (1912), R. 9, para. 272
——R. 9 applies to assessing of pleader's fees in land acquisition proceedings **201***b*
——**R. 24**—Plaints and applications with stamps of other dates can be received, but note of date of actual presentation should be made before admission **387**
——**R. 573**—Duly authorized general agent's signature is sufficient under R. 573 **251 (1)**
Oudh Estates Act (1 of 1869)
——List No. 6—Entry of name of only one of two brothers in list No. 6—Name of person held to be entered in capacity of managing member of family **109***c*
——**S. 14**—"Estate" defined—Property in hands of transferee is not "estate" or part of "estate" **111**
Oudh Laws Act (18 of 1876)
——**S. 3**—S. 3 has made Mahomedan law of gift applicable to Mahomedans **167 (2)***c*
——**S. 5**—Property worth nine lakhs and dower fixed twenty-five lakhs—One lakh held to be reasonable dower—Mahomedan law, dower **1***i*
——**S. 7**—Presumption of pre-emption is statutory in absence of contract or custom—Entry in Wajibularz allowing sales of share to anybody is proof of contrary custom **165***a*
——**S. 9**—S. 9 contemplates legitimate relationship—Illegitimate sons have no better right to pre-emption than real collaterals **243**
——**S. 9**—Cosharer vendee acquiring equal status pending appeal in pre-emption suit is entitled to get right to buy determined by casting lots **238***a*
——**S. 9**—Appellate Court is competent to consider facts affecting status of parties though occurring after first Court's decree **238***b*
——**S. 9 (2)**—Between two cosharers, one related to vendors has preferential right of pre-emption **405**
——**S. 15**—Pre-emption decree on default of payment becomes decree for dismissal —Appeal lies but not revision **221**
Oudh Rent Acts (19 of 1868 and 22 of 1886)
——"Kabiz darmiani" means under proprietor **213***a*
——**(22 of 1886)**
——Trees are immovable property **106***a*
——Act must be interpreted with reference to General Clauses Act (10 of 1897), and not United Provinces Act (1 of 1904) **106***b*
——**S. 2 (5)**—"Portion of produce" refers to produce actually grown and not that ought to have grown—Rent payable in kind—Tenant allowing field to lie fallow there will be no arrears of rent—Landlord can sue for damages **174***a*
——**S. 3 (8)**—Under proprietor's rights are not exhaustively defined in S. 3—Right of re-entry of proprietor is barred against under proprietor — Difference between superior and under proprietor pointed out **37***a*
——**S. 5**—Occupancy tenant has right to plant trees without landlord's permission **218***a*
——**S. 7-A (4)**—Voluntary agreement to surrender occupancy right in *sir* in consideration of being allowed to hold it rent-free for life effected before S. 7-A was enacted is valid and enforceable against heirs of exproprietor **413**
——**Ss. 107-H and 108 (5-A)**—Revenue Court's decision in suit for resumption of muafi grant, that defendants were under proprietors and not proprietors as alleged does not prevent civil Courts from trying same question **273**
——**S. 119-A** — Limitation Act (9 of 1908), S. 4 — S. 4 applies to appeals under Oudh Rent Act (1886), S. 119-A **255 (1)***b*
——**Ss. 124-C and 124-D**—S. 124-C and S. 124-D apply only to suit in wrong Court but not when suit is frivolous **174***b*

Oudh Rent Act
——**S. 126**—Suit by cosharer for his share of rent from joint tenants is not maintainable **421***b*
——**S. 127**—Absence of consent refers to period for which rent is claimed—Subsequent withdrawal of consent does not bring case within S. 127—S. 127 gives landlord option to sue trespasser in civil or revenue Courts — Occupation once lawful, even if it becomes unlawful, is not excluded from purview of S. 127—Scope of S. 127 and S. 108 (2) explained **417**
——**S. 138**—Whether payment of rent to intervener was bona fide and whether intervener was in receipt and enjoyment is main question under S. 138 **421***a*
——**S. 140**—Set-off cannot be claimed in rent suit unless under S. 140—Part payment by way of dahyak allowance can be pleaded **127**
Oudh Sub-Settlement Act (26 of 1866)
——**Rr. 2** and **10**—Grant of cash nankar by mortgagee for mortgagor's maintenance does not amount to grant of under proprietary right after mortgage becomes irredeemable **157***a*
——**Rr. 2** and **10** — Under proprietary right not granted by settlement Court cannot be set up before civil Court **157***b*
——**R. 2**—Right to cash nankar does not necessarily connote right to possession of land as an under proprietor **157***c*
——**R. 2**—Mere possession unless accompanied with decree of settlement Court in lessee's favour does not give him under proprietary right **157***d*
——**R. 2** — Sub-settlement refused by settlement Court cannot be revived **157***f*
——**R. 10** — Under R. 10 under proprietary right in respect of land held as *sir* or nankar can be claimed by former proprietor **157***e*
Oudh Waste Land Rules
——Land purchased under, is not grant and cannot be devised at will **100***c*

P

Pardanashin Lady
——Requisites for relying on deed by pardanashin lady explained **348**
Partition
——Suit for, between two widows—Another minor heir entitled to share living with one of the widows—Security for minor's share demanded before final decree—Final decree held could not be conditional **397**

Penal Code (45 of 1860)
——**S. 109**—Not intervening or not raising alarm does not amount to abetment **262***a*
——**S. 141 (4)**—Persons maintaining existing peaceful possession do not constitute unlawful assembly **222**
——**Ss. 147** and **149** — Separate sentences may be passed **205**
——**S. 188** — Criminal P. C. (1898), S. 550—Police Sub-Inspector suspecting logs on railway trucks to be stolen property directed station master to detain them—Order held to be irregular, seizure under S. 550 being necessary — Logs detained for some time and forwarded as per orders of Traffic Superintendent—Station master held not guilty under Penal Code (1860), S. 188 **230**
——**S. 216**— Order of arrest and its knowledge is essential—Knowledge cannot be presumed—What is not sufficient to impute notice pointed out **204**
——**S. 218**—Pay sheets of labourers in railway office is record within the meaning of S. 218 **361***b*
——**S. 304-A**—Death resulting by overturning of boat owing to natural causes and not by overcrowding or unseaworthiness of boat—No offence under S. 304-A **412**
——**S. 361**—Paternal uncles claiming adversely to minor and forcibly removing minor after 18 months from custody of maternal uncle held rightly convicted under S. 361 **329***a*
——**Ss. 366** and **361** — "Taking" in S. 361 refers to physical removal—Girl taken with father's consent and married in the house where she was residing without consent — No offence under S. 366 is committed **126**
——**S. 395** — Evidence that accused pointed out place where articles were found is alone not conclusive to prove offence **185**
——**S. 451**—Consent of owner rebuts offence under S. 451—Owner's absence of consent must be proved **182**
——**S. 465** — Evidence Act (1 of 1872), S. 45—Similarity of handwriting may be corroborative — But conviction for forgery cannot be based on it **275***a*
Pleadings
——Construction—Admission in written statement that plaintiffs were near relations and heirs is not admission of plaintiff's claim as nearest reversioner **291***a*

Practice
—— Authority — District Magistrate's order in executive capacity without statutory authority is void — Local Government may give executive power but it must be based on authority from Parliament—No officer can without such authority interfere with any person **381**
—— Evidence—Though reliability cannot be questioned sufficiency can be questioned in second appeal **336*a***
—— New case — Case not set up in Courts below cannot be allowed to be raised in second appeal **248*c***
—— High Court as criminal Court cannot send for record of civil or revenue Court **225*e***
—— Pleadings—Custom pleaded but not proved—General law can be resorted to **218*b***
——Record—Expunging — Adverse remark against pleader if unjustified should be expunged **171*d***
——Right of parties—Right to sue objected to by person having no interest—Objection must be disregarded **109*e***
——Parties — Defendant joined at his instance—Plaintiff objecting—Plaintiff's appeal dismissed—Evidence of both parties recorded—In appeal plaintiff contending, on different grounds, that defendants should not have been joined and their names and pleadings should be expunged—Prayer was rejected **52*b***
—— Relief — Decree on admission by some defendants cannot be granted if relief not divisible and plaintiff's claim is not proved as against contesting defendants **52*c***
—— Pleadings—Party trying to prove point not specifically alleged—Rebutting evidence must be allowed **52*i***
—— Evidence—Question about happening of event in cross-examination does not impute assertion of that event **52*j***
—— Pleadings—Execution denied — Alternative pleading that if executed it was under undue influence—Execution held denied **44*a***
—— Burden of proof—Statements of witnesses of other side ought to be considered when determining whether burden of proof is discharged or not **44*d***

Pre-emption
—— Pre-emptor is bound to pay, besides amount of foreclosure decree, arrears of rent recovered from the mortgagee under Ss. 152 and 154, Oudh Rent Act—Payment made by mortgagee were to save property from sale **363**
——Rights arise only when there is sale or foreclosure Perpetual lease giving heritable and transferable, reserving annual rent is not sale of proprietary or under proprietary tenure **360**
—— Decree obtained against local manager of joint Hindu family if not vitiated by fraud is binding on all members—Hindu law, joint family, manager **353*d***
—— Compromise—Effect — Transfer is not voluntary but by operation of law **353*e***
——Right of superior pre-emptor barred by limitation—Inferior pre-emptor cannot be defeated by subsequent purchase **352*b***
——Exproprietary tenant cannot pre-empt **130**

Provincial Insolvency Act (3 of 1907)
——**S. 6 (2)**—Applicant serving in one district but having property in another —Former Court can entertain petition **313**
——**S. 16 (2)** — Prohibition applies to creditors who have received notice **322*a***
*——**S. 36**—Period of two years is to be counted from date of order and not from date of application **246**
——**S. 43**—Debtor's act of bad faith is no ground to refuse adjudication — But cognizance of it can be taken at any time **386**
—— **S. 45**—Scope—An order of discharge operates only to free debtors from the debts entered in the schedule **322*b***

Provincial Small Cause Courts Act (9 of 1887)
—— **Art. 41**—Suit for contribution of rent by cosharer is not excepted **385**
——**Sch. 2, Art. 8**—Theka of right to fish or collect produce is not lease—Fee payable is not rent — Hence suit for theka money is not excepted **272(2)**

R

Registration Act (16 of 1908)
— **S. 17 (b) (6)**—Compromise in mutation proceedings is inadmissible without registration **235*b***
——**S. 35** — Evidence Act (1 of 1872), S. 35—Endorsement by registering officer about age is not conclusive proof of age as that officer is not bound to record age **44*c***

Registration Act
—S. 49—Unregistered deed is admissible to prove executant's state of mind **52***o*

S

Specific Relief Act (1 of 1877)
—S. 42 — Question of discretion cannot be considered unless case heard on merits **423***b*
—S. 42 — Suit for declaration that defendant 2 is not illegitimate son of plaintiff from defendant 1 is tenable when order for maintenance is passed under Criminal P. C., S. 483 **374**
—S. 42—S. 42 is discretionary—General and common law right illustrated—Infringement of right held not such as to justify declaration **286***a*
—S. 42—Declaration of abstract right without practical equity or use should not be granted **286***b*
—S. 42—No cause of action for declaration held proved **190***c*
—S. 42 — Declaration of binding nature of revenue decision should not be granted by civil Court **190***d*

Stamp Act (2 of 1899)
—Art. 45—Final decree for partition must be stamped **2***m*

Succession Act (10 of 1865)
—S. 50—Will attested after ten years of execution on admission, satisfies requirements of S. 50—Before attestation, will held not legal—Place of signature not fixed — Execution and registration held effected on same day **52***e*

T

Talukdar
—Acquisitions — Subsequent acquisition is to form part of original property or not depends on intention **100***b*

Transfer of Property Act (4 of 1882)
—S. 3—Attestation is no notice of or consent to contents **369***d*
—S. 52—Lis pendens applies to pre-emption suit — Transfer to superior pre-emptor after suit by inferior pre-emptor cannot be upheld **352***a*
—S. 53 — Undue preference to one creditor is no ground for setting aside transfer if creditor is innocent **392***a*
—S. 53—What are important circumstances to determine whether transaction is fraudulent stated **392***b*
—S. 58 (c) — Payment of debt is not necessary condition — Stipulation to cancel sale and to return property on payment of consideration with interest within specified time creates mortgage with conditional sale **366***b*
—S. 60—Redemption before fixed date cannot be forced on mortgagee — But terms which are clog on equity of redemption cannot be allowed — What is clog on equity of redemption explained **379**
—S. 60 — Condition not to redeem prior mortgage before subsequent one is, though enforceable against mortgagor, not enforceable against subsequent purchaser **304**
—S. 60 — Usufructuary mortgage—Redemption before certain period not restrained — But period within which debt likely to be satisfied out of usufruct mentioned — Mortgage can be redeemed before or after period mentioned—Intention of mentioning period should be ascertained **160**
—S. 61 — Undertaking by mortgagor to pay money advanced on later security with money due on earlier security—Such an undertaking does not preclude separate redemption **23***a*
—Ss. 63 and 62 — S. 62 is supplementary to S. 60—S. 62 does not apply when taking of accounts is stipulated—It contemplates only one transaction and not where other mortgages are also executed **376**
—S. 66—Mortgagee kept out of possession must sue for it and cannot demand interest though rate has been mentioned **140***b*
—S. 72 — Costs of rent suit in good faith are recoverable by mortgagee in possession **330**
—Ss. 83 and 103 — When mortgagee is minor there should be appointment of guardian ad litem preliminary to proceedings under S. 83 **107***a*
* —S. 84 — Particular month fixed—Tender in any other is not valid for stopping interest **140***a*
—S. 95—One of original mortgagor's representatives redeeming prior mortgage—He has charge on shares of other representatives of original mortgagor for proportionate expenses **234***b*
—S. 95 — Co-mortgagor redeeming usufructuary mortgage and obtaining possession cannot be given decree for sale on ground of his redeeming it **234***c*
—S. 100 — Charge not created by registered deed but by will cannot be enforced against bona fide stranger auc-

Transfer of Property Act
tion-purchaser for value — Difference between charge and mortgage pointed out **349**

Trusts Act (2 of 1882)
——**S. 10**—Person not sui juris cannot be trustee **408***b*

U

U. P. Court of Wards Act (3 of 1898)
— Long lease of 100 years for planting groves is beyond powers of managers **269**

——**(4 of 1912)**
——**S. 55** — S. 55 bars personal execution against ward **125***a*

U. P. Land Revenue Act (3 of 1901)
——**Ss. 11** and **114**—Objection in partition referred to civil Court — Partition cannot be said to be subject to civil Court's decision **248***b*
——**S. 111**—Decision of title by revenue Court is conclusive and cannot be challenged in civil Court — Non-adoption of procedure is immaterial **343***b*
—— **S. 111** — Order rejecting objection summarily is appealable though question of title not decided specifically **343***e*
——**S. 111**—Jurisdiction—Civil Court—Jurisdiction conferred by statute—Conditions must be strictly observed **115***a*
—— **S. 111 (1) (a), (b)** and **c** — Jurisdiction conferred on civil Court by Cls. (a) and (b) is original — That conferred by Cl. (c) is appellate **115***b*
—— **S. 114**—Objection beyond time can

U. P. Land Revenue Act
be entertained if no action under S. 114 is taken **343***c*
—— **S. 144** — Lambardari fee does not include expenses of collection of rent of suits for recovery of rent **378***a*
——**S. 233, Cl. (k)** — Revenue Court's jurisdiction in partition is exclusive and suit for possession of land allotted to another mahal cannot lie **248***a*

U. P. Motor Vehicles Act (2 of 1911)
——**S. 13 (b)** — "Employs" in S. 13 means "has" or retains in service— License must be in force **272(1)**

W

Wajibularz
——Construction — Sonless widow to remain "malik" means only widow's estate **336***b*
——Custom—Proof—Wajibularz is good proof of custom unless entry is only expression of views and not record of existing fact **318***c*
——Construction—The interpretation of one Wajibularz does not govern the interpretation of a different Wajibularz **265***d*
——Exclusion from inheritance may be by implication **25(2)***a*

Will
——Revocation — Adoption of son does not ipso facto revoke will **52***f*
——Revocation to be valid and operative by fresh bequest it must be in clear and unambiguous terms conferring title **52***g*

THE

ALL INDIA REPORTER

1914 OUDH

COMPARATIVE TABLES

(PARALLEL REFERENCES)

Hints for the use of the following Tables

Table No. I—This Table shows serially the pages of INDIAN LAW REPORTS, for the year 1914 with corresponding references of the ALL INDIA REPORTER.

Table No. II—This Table shows serially the pages of other REPORTS and JOURNALS for the year 1914 with corresponding references of the ALL INDIA REPORTER.

Table No. III—This Table is the converse of the **First** and **Second Tables.** It shows serially the pages of the ALL INDIA REPORTER for 1914 with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

TABLE No. I

Showing seriatim the pages of OUDH CASES for the year 1914 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of 17 OUDH CASES.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

17 Oudh Cases=All India Reporter.

O.C.)	A. I. R.			O.C.)	A. I. R.			O.C.)	A. I. R.			O.C.)	A. I. R.			O.C.)	A. I. R.		
1	1914	*O*	123	92	1914	*O*	167	184	1914	*O*	205	263	1914	*O*	381	327	1914	*O*	357
6	"	"	127	94	"	"	270	186	"	"	315	267	"	"	322	331	"	"	374
14	"	"	147	99	"	"	199	193	"	"	399	273	"	"	406	336	"	"	391
18	"	"	264	105	"	"	165	207	"	"	233	276	"	"	275	339	"	"	405
21	"	"	222	108	"	"	149	210	"	"	282	284	"	"	201	343	"	"	417
25	"	"	225	120	"	*PC*	105	213	"	"	278	291	"	"	269	347	"	"	209
33	"	*PC*	153	134	"	*O*	341	218	"	"	160	294	"	"	283	354	"	"	286
38	"	*O*	251	138	"	"	386	224	"	"	115	299	"	"	360	363	"	"	388
47	"	"	330	142	"	"	345	235	"	"	326	303	"	"	304	369	"	"	423
52	"	"	338	148	"	"	387	242	"	"	238	306	"	"	307	374	"	"	359
55	"	"	174	150	"	"	352	250	"	"	243	309	"	"	407	377	"	"	383
60	"	"	167	153	"	"	245	252	"	"	247	311	"	"	272	379	"	"	363
68	*Old case*			157	"	"	369	254	"	"	255	313	"	"	379	386	"	"	327
86	1914	*O*	273	169	"	"	430	256	"	"	280	318	"	"	310	388	"	"	376
90	"	"	396	173	"	"	392	260	"	"	367								

TABLE No. II

Showing seriatim the pages of other REPORTS, JOURNALS and PERIODICALS for the year 1914 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of others JOURNALS.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

1 Oudh Law Journal=All India Reporter

OLJ)	A. I. R.			OLJ)	A. I. R.			OLJ)	A. I. R.			OLJ)	A. I. R.			OLJ)	A. I. R.		
1	1914	*O*	131	152	1914	*O*	165	271	1914	*O*	398	447	1914	*O*	291	559	1914	*O*	285
30	"	"	204	156	"	"	231	281	"	"	1	456	"	"	353	561	"	"	314
33	"	"	218	159	"	*PC*	153	319	"	"	265	463	"	"	360	564	"	"	280
38	"	"	248	163	"	*O*	32	328	"	"	205	466	"	"	348	568	"	"	407
43	"	"	349	175	"	"	426	330	"	"	126	470	"	"	336	570	"	"	421
48	"	"	182	184	"	"	378	334	"	"	265	475	"	"	296	574	"	"	417
50	"	"	137	187	"	"	352	335	"	"	115	481	"	"	381	591	"	"	52
57	*Old case*			190	"	*A*	177	344	"	"	190	485	"	"	303	637	"	"	414
63	1914	*O*	212	191	"	*O*	221	352	"	"	341	487	"	"	406	698	"	"	324
67	*Old case*			193	"	"	332	356	"	"	251	493	"	"	397	703	"	"	366
74	1914	*O*	185	196	"	"	216	360	"	"	262	496	"	"	286	708	"	"	328
78	"	"	241	200	"	"	361	366	"	"	44	503	"	"	310	709	"	"	384
81	"	"	343	204	"	"	255	389	"	"	37	512	"	"	187	711	"	"	412
86	"	"	208	218	*Old case*			397	"	"	100	518	"	"	299	714	"	"	335
89	"	"	42	223	1914	*O*	387	403	"	"	268	527	"	"	222	719	"	"	413
92	"	"	189	225	"	"	369	405	"	"	130	532	"	"	318	726	"	"	408
95	"	"	176	238	*Old case*			407	"	"	194	541	"	"	305	735	"	"	374
109	*Old case*			242	1914	*O*	31	416	"	"	329	544	"	"	289	742	"	"	333
127	1914	*O*	199	244	"	"	385	421	"	"	213	548	"	"	237	747	"	"	339
133	"	"	167	249	"	*PC*	105	426	"	"	154	549	"	"	308	753	"	"	388
141	"	"	171	261	"	*O*	184	433	"	"	209	553	"	"	278	761	"	"	425
147	"	"	174	263	"	"	140	442	"	"	293	557	"	"	410				

(Board of Revenue Cases are not included)

15 Cr. L. J. & 22 to 25 Indian Cases=All India Reporter.

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1914 Lahore.**

TABLE No. III

Showing seriatim the pages of ALL INDIA REPORTER, 1914 OUDH with corresponding references of other REPORTS, JOURNALS and PERIODICALS including the INDIAN LAW REPORTS.

N. B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1914 OUDH.

Column No. 2 denotes corresponding references of other REPORTS and JOURNALS.

A. I. R. 1914 Oudh=Other Journals

A.I.R.)	Other Journals			A.I.R.)	Other Journals			A.I.R.)	Other Journals			A.I.R.)	Other Journals		
1	1	*O L J*	281	41	22	*I C*	259	106	22	*I C*	605	123	20	*I C*	894
	24	*I C*	643	42	1	*O L J*	89	107	16	*O C*	261	125	25	*I C*	668
18	23	*I C*	224		23	*I C*	972		22	*I C*	245	126	1	*O L J*	330
23	16	*O C*	267	44	1	*O L J*	366	109	22	*I C*	129		25	*I C*	638
	22	*I C*	132		25	*I C*	648	111	16	*O C*	277		15	*Cr L J*	630
25	22	*I C*	138	52	1	*O L J*	591		22	*I C*	267	127	17	*O C*	6
31	1	*O L J*	242		26	*I C*	547	113	16	*O C*	283		21	*I C*	201
	24	*I C*	350	95	16	*O C*	359		22	*I C*	261	130	1	*O L J*	405
	15	*Cr L J*	470		22	*I C*	702	114	15	*Cr L J*	2		25	*I C*	718
32	1	*O L J*	163	100	1	*O L J*	397		22	*I C*	146	131	1	*O L J*	1
	24	*I C*	562		25	*I C*	680	115	17	*O C*	224		16	*O C*	325
	15	*Cr L J*	474	103	22	*I C*	128		1	*O L J*	335		22	*I C*	529
37	1	*O L J*	389	104	16	*O C*	285		25	*I C*	316		1	*O L J*	50
	25	*I C*	675		22	*I C*	263	118	23	*I C*	231	137	23	*I C*	871
41	16	*O C*	264	106	16	*O C*	346	123	17	*O C*	1				

A. I. R. 1914 Oudh=Other Journals—(*Contd.*)

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
140	1	*O L J*	263	209	17	*O C*	347	269	25	*I C*	599	329	1	*O L J*	416
	24	*I C*	874		1	*O L J*	433	270	17	*O C*	94		25	*I C*	840
144	22	*I C*	887		25	*I C*	752		24	*I C*	137		15	*Cr L J*	640
146	25	*I C*	26	212	1	*O L J*	63	272 (1)	17	*O C*	311	330	17	*O C*	47
147	17	*O C*	14		23	*I C*	957		15	*Cr L J*	677		23	*I C*	456
	21	*I C*	193	213	1	*O L J*	421		25	*I C*	1005	332	1	*O L J*	193
148	15	*Cr L J*	577		25	*I C*	743	272 (2)	25	*I C*	666		24	*I C*	113
	25	*I C*	329	216	1	*O L J*	196	273	17	*O C*	86	333	18	*O C*	55
149	17	*O C*	108		24	*I C*	116		24	*I C*	223		1	*O L J*	742
	24	*I C*	542	218	16	*O C*	341	275	15	*Cr L J*	643		27	*I C*	72
154	1	*O L J*	426		21	*I C*	744		17	*O C*	276	335	1	*O L J*	714
	25	*I C*	749		1	*O L J*	33		25	*I C*	863		26	*I C*	717
157	22	*I C*	125	220 (1)	24	*I C*	115	278	17	*O C*	213	336	1	*O L J*	470
160	17	*O C*	218	220 (2)	25	*I C*	6		25	*I C*	409		25	*I C*	869
	25	*I C*	302	221	1	*O L J*	191		1	*O L J*	553	338	17	*O C*	52
162	22	*I C*	923		24	*I C*	109	280	17	*O C*	256		23	*I C*	406
164	25	*I C*	17	222	17	*O C*	21		25	*I C*	704	339	18	*O C*	34
165	17	*O C*	105		23	*I C*	184		1	*O L J*	564		27	*I C*	118
	23	*I C*	943		15	*Cr L J*	232	282	17	*O C*	210		1	*O L J*	747
	1	*O L J*	152		1	*O L J*	527		25	*I C*	403	341	17	*O C*	134
167 (1)	17	*O C*	92	223	24	*I C*	620	283	17	*O C*	294		25	*I C*	138
	24	*I C*	975	225	17	*O C*	25		25	*I C*	600		1	*O L J*	352
	15	*Cr L J*	567		22	*I C*	1001	285	15	*Cr L J*	685	343	1	*O L J*	81
167 (2)	17	*O C*	60		15	*Cr L J*	217		26	*I C*	133		23	*I C*	965
	23	*I C*	453	228	24	*I C*	633		1	*O L J*	559	345	17	*O C*	142
	1	*O L J*	133	230	16	*O C*	371	286	17	*O C*	354		24	*I C*	604
171	15	*Cr L J*	420		22	*I C*	753		25	*I C*	908		15	*Cr L J*	516
	24	*I C*	156		15	*Cr L J*	177		1	*O L J*	496	348	1	*O L J*	466
	1	*O L J*	141	231	1	*O L J*	156	289	1	*O L J*	544		25	*I C*	861
174	1	*O L J*	147		24	*I C*	673		26	*I C*	177	349	1	*O L J*	43
	23	*I C*	460	233	17	*O C*	207	291	1	*O L J*	447		23	*I C*	867
	17	*O C*	55		25	*I C*	384		25	*I C*	823	352	17	*O C*	150
176	15	*Cr L J*	440	234	22	*I C*	918	293	1	*O L J*	442		24	*I C*	32
	24	*I C*	146	235	25	*I C*	34		25	*I C*	816		1	*O L J*	187
	1	*O L J*	95	237	1	*O L J*	548	296	1	*O L J*	475	353	1	*O L J*	456
182	1	*O L J*	48		26	*I C*	108		25	*I C*	806		25	*I C*	849
	23	*I C*	703	238	17	*O C*	242	299	1	*O L J*	518	357	17	*O C*	327
	15	*Cr L J*	351		25	*I C*	694		26	*I C*	26		26	*I C*	503
183	25	*I C*	227	241	1	*O L J*	78	303	1	*O L J*	485	359	17	*O C*	374
184	1	*O L J*	261		23	*I C*	962		25	*I C*	916		27	*I C*	363
	24	*I C*	871	243	17	*O C*	250	304	17	*O C*	303	360	17	*O C*	299
185	1	*O L J*	74		25	*I C*	688		25	*I C*	905		1	*O L J*	463
	23	*I C*	1004	244	23	*I C*	209	305	1	*O L J*	541		25	*I C*	855
	15	*Cr L J*	404	245	17	*O C*	153		26	*I C*	169	361	15	*Cr L J*	502
187	1	*O L J*	512		25	*I C*	121		15	*Cr L J*	721		24	*I C*	590
	25	*I C*	914	246	23	*I C*	924	306	25	*I C*	8		1	*O L J*	200
189	1	*O L J*	92	247	17	*O C*	252	307	17	*O C*	306	363	17	*O C*	379
	23	*I C*	976		25	*I C*	701		25	*I C*	907		27	*I C*	420
190	1	*O L J*	344	248	1	*O L J*	38	308	1	*O L J*	549	366	1	*O L J*	703
	25	*I C*	603		23	*I C*	860		26	*I C*	204		26	*I C*	706
193	16	*O C*	370	251 (1)	1	*O L J*	356	310	17	*O C*	318	367	17	*O C*	260
	23	*I C*	508		25	*I C*	608		1	*O L J*	503		15	*Cr L J*	646
	15	*Cr L J*	300	251 (2)	17	*O C*	38		25	*I C*	917		25	*I C*	846
194	1	*O L J*	407		23	*I C*	448	313	25	*I C*	41	369	17	*O C*	157
	25	*I C*	833	255 (1)	17	*O C*	254	314	1	*O L J*	561		24	*I C*	45
	15	*Cr L J*	633		25	*I C*	703		26	*I C*	225		1	*O L J*	225
199	17	*O C*	99	255 (2)	1	*O L J*	204	315	17	*O C*	186	374	17	*O C*	331
	23	*I C*	935		24	*I C*	72		25	*I C*	45		26	*I C*	526
	1	*O L J*	127	262	1	*O L J*	360	318	1	*O L J*	532		1	*O L J*	735
201	17	*O C*	284		25	*I C*	625		26	*I C*	98	376	17	*O C*	388
	25	*I C*	732		15	*Cr L J*	617	322	17	*O C*	267		27	*I C*	427
204	1	*O L J*	30	264	17	*O C*	18		25	*I C*	708	378	1	*O L J*	184
	23	*I C*	701		23	*I C*	182	324	1	*O L J*	698		24	*I C*	15
	15	*Cr L J*	349		15	*Cr L J*	230		26	*I C*	600	379	17	*O C*	313
205	17	*O C*	184	265 (1)	1	*O L J*	334	326	17	*O C*	235		25	*I C*	912
	1	*O L J*	328		25	*I C*	596		25	*I C*	689	381	17	*O C*	263
	25	*I C*	633	265 (2)	1	*O L J*	319	327	17	*O C*	386		25	*I C*	996
	15	*Cr L J*	625		24	*I C*	640		27	*I C*	424		15	*Cr L J*	668
206	25	*I C*	9	268	1	*O L J*	403		2	*O L J*	129		1	*O L J*	481
208	1	*O L J*	86		25	*I C*	684	328	1	*O L J*	708				
	23	*I C*	969	269	17	*O C*	291		26	*I C*	712	383	17	*O C*	377

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
383	27	*I C*	419	392	17	*O C*	173	406	15	*Cr L J*	638	414	16	*Cr L J*	62
384	18	*O C*	64		25	*I C*	164	407	17	*O C*	309	416	24	*I C*	376
	26	*I C*	714	396	17	*O C*	90		26	*I C*	1003	417	17	*O C*	343
	1	*O L J*	709		24	*I C*	286		1	*O L J*	568		26	*I C*	242
385	1	*O L J*	244	397	1	*O L J*	493		16	*Cr L J*	91		1	*O L J*	574
	24	*I C*	28		25	*I C*	904	408	18	*O C*	38	419	24	*I C*	381
386	17	*O C*	138	398	1	*O L J*	271		27	*I C*	389	421	1	*O L J*	570
	25	*I C*	363		24	*I C*	951		1	*O L J*	726		26	*I C*	237
387	17	*O C*	148		15	*Cr L J*	543	410	1	*O L J*	557	423	17	*O C*	369
	24	*I C*	119	399	17	*O C*	193		26	*I C*	231		27	*I C*	354
	1	*O L J*	223		25	*I C*	146	411	24	*I C*	275	425	18	*O C*	66
388	17	*O C*	363	405	17	*O C*	339	412	1	*O L J*	711		27	*I C*	121
	27	*I C*	196		26	*I C*	517		26	*I C*	664		1	*C L J*	761
	1	*O L J*	753		2	*O L J*	148	413	1	*O L J*	719	426	1	*O L J*	175
	16	*Cr L J*	132	406	17	*O C*	273		27	*I C*	376		24	*I C*	2
391	17	*O C*	336		25	*I C*	838	414	1	*O L J*	687	430	17	*O C*	169
	26	*I C*	621		1	*O L J*	487		26	*I C*	654		25	*I C*	160

N. DAR, B. A. LL. B.,
Vakil High Court,
SRINAGAR (Kashmir)

S. N. DAR, B. A. LL. B
Vakil High Court,
SRINAGAR (Kashmir)

THE ALL INDIA REPORTER 1914

OUDH J. C's COURT

A.I. R. 1914 Oudh 1

LINDSAY, J. C. AND KANHAIYA LAL, A. J. C.

Suraiya Qadr— Defendant — Appellant.

v.

Qudsia Begam, Shah Rukh Ruqaiya Begam and *others*—Plaintiff and Defendants—Respondents.

First Appeal No. 67 of 1912, Decided on 16th April 1914, from decree of Dist. Judge, Lucknow, D- 28th March 1912.

(a) Evidence Act (1 of 1872), S. 33—Deposition of deceased made reluctantly though irrelevant in that case, is good evidence in subsequent case if not suspected to be false.

A statement made by a deceased person during his examination in a previous case, although irrelevant for the purposes of that case and made with considerable reluctance and unwillingness, is nevertheless in a subsequent case a good evidence of the fact admitted in that statement if there is no reason to suspect it to have been falsely made. [P 5 C 2]

(b) Mahomedan Law— Legitimacy — Circumstances and evidence of conduct necessary to prove legitimacy stated.

Where it was proved that a person was brought up in the house of his father and educated with another son, that he and the other son were married into the same family and were treated alike by the father, and that he received an allowance, was entrusted with the management of some of his father's affairs and was introduced into society as his father's son.

Held: that the above circumstances were sufficient to prove that the person was the legitimate son of his father. [P 8 C 2]

(c) Mahomedan Law—Legitimacy—Legitimacy can be presumed from circumstances without proof of marriage—Presumption is rebutted if marriage is illegal.

According to Mahomedan law the legitimacy or legitimation of a child of Mahomedan parents may properly be presumed or inferred from circumstances without proof, or at least without direct proof, either of a marriage between the parents or of any formal act of legitimation. But if any insurmountable legal obstacle to any legitimate union between the parents, e. g. one on the ground of fosterage, is proved to exist, the presumption must give way: 3 *M. I. A.* 295 and 8 *M. I. A.* 136, *Ref.* [P 8 C 2]

(d) Mahomedan Law—Legitimacy—Burden of proof—Person alleging illegitimacy must rebut presumption of legitimacy based on circumstances.

Where there is an abundance of circumstances to justify the inference that one person is the wife, and another is the lawful son, of some other person, it is for those who deny the status of the wife and the son to produce strong and conclusive evidence to rebut the presumption of a lawful connexion and legitimacy. [P 9 C 1]

(e) Mahomedan Law—Marriage—Fosterage —Essential of establishing fosterage pointed out.

Under the Shia law, the facts which constitute relationship by fosterage are: (1) the milk of the foster mother must proceed from marriage and not from illicit intercourse, (2) there must be either 10 or 15 complete acts of suckling or the suckling must have continued for a day and night, (3) the suckling for the prescribed number of times or for the said period must have taken place before the child attains the age of two years, and (4) the milk should arise from intercourse with one male. [P 9 C 1]

(f) Evidence Act (1 of 1872), S. 32 (5)— Hearsay evidence of fosterage is not admissible.

Hearsay evidence is not admissible under S. 32, Cl. (5), to prove the case of fosterage, inasmuch as even if it be assumed that connexion by fosterage can amount to "relationship" in any sense of the term, the relationship is not "by blood marriage or adoption." [P 9 C 2]

(g) Mahomedan Law—Legitimacy—Proof— Written statement by mother showing invalidity of marriage does not affect proof of legitimacy of son from circumstances as proof of marriage is not required to prove legitimacy of child.

One of the defendants was the mother of another defendant in the case. The questions as to the validity of the mother's marriage and the

son's legitimacy were in dispute. There were certain allegations put forward in the written statement filed on behalf of the mother and signed and verified by her general agent, upon which it could be contended that the marriage was void. The Court was therefore asked to accept these allegations as conclusive and to find that the mother was not legally married and that her son was a bastard. The mother did not give evidence in the case, which might have supported or qualified these allegations, and there was no direct proof of marriage, but there was a large volume of evidence relating to the treatment of the son as legitimate:

Held: that in view of the law that the legitimacy of a child of Mahomedan parents may be established from circumstances without direct proof either of marriage between the parents or of any formal act of legitimation, the son ought to be regarded as legitimate in accordance with the general evidence of treatment and acknowledgment put forward on his behalf and irrespective of any allegations made by or on behalf of his mother in her written statement: 3 *M. I. A.* 295 and 8 *M. I. A.* 136, *Ref.*

Held further, as a conclusion, that there was a lawful union between the mother and the father of the son. [P 12 C 2]

(h) Mahomedan Law—Succession—"Habua" explained—Habua is taken by eldest child not as increment to his share but as mark of head of family—Eldest surviving son inherits habua and it passes to his heirs—Meaning of habua is restricted and is not enlarged by term expressed loosely.

Habua is the collective name gievn to certain articles of property of the deceased, viz. the Quran, sword, ring and body clothes, which the eldest male child is entitled to receive under the Shia law as a special mark of favour, and not as an increase to his share of inheritance, and which are treated as insignia pertaining to the office of the head of the family.

The eldest surviving son at the death of his father is entitled to habua and his title to the property is vested and passes upon his death to his heirs.

Where a decree set out that a person should get "the personal effects of the deceased as habua, viz. his sabre, Quran, signet ring and personal clothing," and the property left by the deceased included a number of such articles:

Held: that the decree merely meant that the person shcuild receive such of the various articles of the said descriptions as were ordinarily used or worn by the deceased. [P 14 C 1, 2]

(i) Oudh Laws Act, S. 5—Property worth nine lakhs and dower fixed twenty-five lakhs—One lakh held to be reasonable dower—Mahomedan law, dower.

The dower had been settled at 25 lakhs of rupees and the property left by the husband was estimated to be worth about 9 lakhs of rupees.

Held: that in view of S. 5, Oudh Laws Act, one lakh of rupees was a reasonable and sufficient amount of dower to be awarded to the wife: 21 *Cal.* 135 (*P. C.*), *Ref.* [P 16 C 1]

(j) Mahomedan Law— Dower — Court can award dower in lump sum in lieu of share of property to avoid disputes.

In order to avoid the possibility of future disputes a Judge may award as dower a lump sum of money and not a specified fractional share of the property left by the deceased husband, even on knowing the rough estimated value of the property without waiting to have its precise valuation ascertained: [P 16 C 2]

(k) Civil P. C. (5 of 1908), O. 20, R. 13—Administration suit—Court can demand security for due performance of funeral rights and expenditure of money allotted for it.

In a suit of administration of the estate of the deceased, with an alternative relief for its partition, a party charged with the duties of attending to funeral ceremonies of the deceased should be called upon to furnish reasonable security for the due performance of those duties and expenditure of the money allotted for those purposes. [P 17 C 1]

(l) Court-fees Act (7 of 1870), S. 7 (4) (f) Administration suit—Accounts demanded—Court-fee is payable on value of relief in suit—Court can ask after determination deficit court-fee—Court-fees Act (1870), S. 11.

The suit as originally framed was one for administration under O. 20, R. 13, Civil P. C. under which the taking of accounts is an essential part of the proceedings, and afterwards the plaintiff also definitely asked for an account to be taken.

Held: that the court-fee on the plaint was to be determined with regard to the provisions of S. 7, Cl. 4 (f), Court-fees Act, and the fee payable was upon the value of the relief sought in the plaint.

A Judge after having found in the initial stage of the case that, owing to the plaintiff's inability to estimate the value of the relief claimed, the plaint was sufficiently stamped with a ten rupee court-fee, under Art. 17, Cl. 6, Sch. 2, Court Fees Act, can subsequently declare, under S. 11 of the Act, that there is a deficiency which is liable to be made good. [P 18 C 1]

(m) Stamp Act (2 of 1899), Art. 45—Final decree for partition must be stamped.

In so far as a final decree operates to effect a partition of moveable or immovable property in specie it should be treated as an instrument of partition and pay the stamp duty in accordance with the provisions of Art. 45. [P 18 C 2]

Moti Lal Nehru, *Shahid Husain* and *Mohamed Wasiul Hasan*—for Appellant.

E. O'Connor, *Zahur Ahmad*, *Brijnath Sharga*, *Nabi Ullah* and *Shahanshah Hussain Razwi*—for Respondents.

Judgment.—These three appeals have sprung out of a suit brought for administration of the estate left by Prince Sulaiman Qadr, a member of the ex-Royal Family of Oudh, who died at Lucknow on 2nd August 1910.

The plaintiff in the suit was Nawab Qudsia Begam, the daughter of the deceased, and the two defendants originally impleaded were Nawab Shah Rukh Ruqaiya Begam alias Nawab Khas Mahal Sahiba, and Nawab Humayun Qadr. The former is the widow of Prince

Sulaiman and the latter, who has died since the suit was brought and is now represented by his widow, a son and four daughters, was the son of Sulaiman by temporary (mutai) wife named Afzal Khanam. The plaintiff who is the daughter of Khas Mahal Sahiba claimed that she and these two defendants were the only lawful heirs of the deceased prince and asked for the division of the estate upon that footing. After the plaint had been lodged application was made on behalf of two other persons, Prince Mirza Suraiya Qadr Bahadur and his mother Sarwat Mahal, praying that they might be joined as defendants. They were added as parties and the case put forward for them was that they were the sole legal heirs of the deceased. It was asserted that Sarwat Mahal had been originally the mutai wife of Prince Sulaiman and that Suraiya Qadr had been born of this union. It was further alleged that Sulaiman had in the year 1901 gone through a ceremony of permanent marriage (nikah) with Sarwat Mahal. The relationship alleged to exist between the deceased, the plaintiff and defendants 1 and 2 was denied and various other pleas were taken to which notice will presently be directed.

The main issues raised were concerned with the question of the relationship of the parties to Prince Sulaiman, and the District Judge who tried the case has found that defendant 1, Ruqaiya Begam, was the nikahi wife of Sulaiman, that the plaintiff, Qudsia Begam, was Sulaiman's daughter by defendant 1, that defendant 2 Humayun Qadr, was the lawful son of the deceased by a mutai wife, that Sarwat Mahal was a mutai wife and that Suraiya Qadr was a lawful son of Sulaiman by Sarwat Mahal.

The latter lady, it may be observed here died before the suit was decided, and is now represented by Suraiya Qadr. Some of these findings of the lower Court have been accepted. It is no longer denied that Ruqaiya Begam is the wife of Sulaiman, that the plaintiff Qudia Regam is Sulaiman's daughter or that Humayun Qadr was the legitimate offspring of mutai marriage. It is however still maintained that there was no valid union between Sarwat Mahal and Sulaiman and that Suraiya Qadr is not an heir of the deceased. The finding of the District Judge with respect to the status of Suraiya Qadr is attacked in the appeals filed by Qudsia Begam and Ruqaiya Begam (Nos. 86 of 1912 and 76 of 1912 respectively) and the question of Suraiya's legitimacy or illegitimacy is the most important matter with which we have to deal here, and it will be the most convenient course to proceed at once to the determination of this issue before touching upon the other points which arise for decision.

We begin then with the case put forward for Sarwat Mahal which is disclosed in a written statement of defence signed and verified by a general agent, one Dildar Husain, which was put in on this lady's behalf on 23rd January 1911.

In para. 8 of this written statement it was alleged that Sulaiman and Sarwat Mahal had entered into a contract of mutai marriage in or about the years 1855-56 A. D. It was stated that at the time of contract there was no specification of any period for which the union was to endure and it was added that one of the terms of the marriage contract was that the lady was to have a right of inheritance to her husband.

In para. 9 of the written statement it was set out that Suraiya Qdar was born of this union on 3rd June 1858, and in para. 10 was an allegation to the effect that Sulaiman had on 22nd January 1901 A. D. converted this temporary union into a permanent one by going through a ceremony of nikah at which it was stipulated that Sarwat Mahal was to receive a dower of one and quarter lakhs of rupees. So far as Suraiya Qadr was 'concerned he contented himself with stating that Sarwat Mahal was his mother, that Sulaiman was his father and that his mother and himself were the sole lawful heirs of Sulaiman. The other parties who disputed the claims of these two defendants did not deny that Suraya was the son of Sulaiman by Sarwat Mahal, but they pleaded that there was no such union between Suraiya's parents as was alleged and that there could not in law have been any valid marrage of this kind. The principal plea put forward in this connexion was that Sarwat Mahal, who was formerly known as Aghai Khanam, was a foster-sister of Prince Sulaiman Qadr by reason of the fact that her mother, a woman named Sahib Khanam, had been

Sulaiman's wet-nurse in the time of his infancy. On this ground it was represented that this relationship by foster-age constituted an insurmountable bar to any lawful marriage between Sulaiman and the mother of Suraiya. The Court below held that the existence of this impediment was not proved, and the matter has again been debated here with the argument that the Judge's finding is wrong. It has also been contended here, as a matter of law, that on the statements contained in para. 8 of Sarwat's written defence the alleged contract of muta was necessarily void.

We may notice at once here that there is no direct evidence of the muta contract set up in Sarwat Mahal's written statement. The only person apparently who could have given such direct evidence was Sarwat Mahal herself and she was not produced as a witness in the case. Much stress has been laid upon this fact by the learned Counsel who have argued in support of the appeals of those parties who are interested to deny the status of Sarwat Mahal and her son. It has been contended that the lady's failure to submit to examination and cross-examination has not been satisfactorily explained and it has even been argued that the large volume of evidence produced to show that Sulaiman treated Sarwat as his wife and Suraiya as his son ought to be disregarded on the ground that direct evidence was available and was withheld! We will notice this latter argument in its proper place; at present we have to consider whether any good reason has been shown why Sarwat Mahal did not tender herself as a witness.

The learned advocate who has appeared for Suraiya Qadr has drawn attention to a medical certificate which is on record, Ex. C 67, and to the evidence of a medical witness, Miss O'Brien, who deposed to having examined Sarwat Mahal on 8th April 1911. In her statement Miss O'Brien explained that on the date in question she had examined Sarwat Mahal principally for the purpose of ascertaining her age. She admitted that she had drawn up this certificate (Ex. C 67). which was shown to her in the course of examination. The certificate sets out that Sarwat Mahal was, on the date in question, in a precarious state of health. She was of advanced years and was described as suffering from cardiac palpitation and arterial sclerosis and as being in a condition which damanded rest and freedom from worry. It is true that Miss O'Brien was not examined touching her statements as to Sarwat's state of health, it would seem that her statement as to the age of Sarwat was treated as being the matter of principal importance; but this notwithstanding, we think we are entitled to look at the whole of the language of this certificate and to accept it as a fact that on 8th April 1911, at any rate, Sarwat Mahal was in a state of health which would have prevented her then giving evidence.

Unfortunately we have no means of knowing whether the lady continued to remain in this weak state during the period while evidence was being taken on commission (July—November 1911). The only further information we have is that Sarwat Mahal died in December 1911 and we may say that it is not unreasonable to conclude that she never recovered her strength between April and this latter date. And while we are on this subject we may as well say that the record of the examination of the witnesses on commission appears to us to supply a reason which might well account for the reluctance of a lady in Sarwat Mahal's position to submit to examination. It is unfortunately necessary by reason of the customs of the country for the Courts here at times to delegate to a commissioner the duty of recording evidence, and it is, we regret, to say, no new experience in this Court to find advantage taken of this procedure to subject witnesses, and in particular paradanashin ladies, to harassing and futile cross-examination which would not be tolerated for a moment in Court. We have before us a record of cross-examination of ladies extending over days—of vexatious and unnecessary questions directed not to the purposes which legitimate cross-examination is intended to serve but rather to the raking up of incidents of domestic history which could have no possible bearing either upon the merits of the case or the credit of the witness—and reading the story on what went on from day to day we are scarcely surprised to find that on one occasion at least the commissioner had to record that one of

the ladies fainted under the stress of the ordeal to which she was being unnecessarily subjected. The commissioner seems to have been unequal to the responsibility of controlling the cross-examination and the witnesses were badgered regardless of any limits of decorum. It is small wonder if ladies fail to display any alacrity in going into the witness-box while procedure of this kind is allowed and we must condemn in the most emphatic language the unworthy conduct of legal practitioners who conceive themselves to be at liberty to transgress to whatever extent they please the legitimate confines of the right of cross-examination. Gross abuse of the privilege of cross-examination may, in our opinion, well amount to improper conduct of which notice may be taken under the provisions of the Legal Practitioners Act.

We need only say in conclusion regarding this part of the case that we think it highly probable that Sarwat Mahal was not in a fit state to give evidence and that we certainly would not be justified in declaring that her evidence was deliberately withheld from the Court.

Direct evidence of the marriage of Sarwat Mahal being thus wanting we have to fall back upon the evidence of treatment and acknowledgment upon the strength of which it is contended that a legitimate union between Sarwat Mahal and Sulaiman Qadr has been established. The volume of evidence of this nature is considerable. We have the testimony of various classes of persons. members of the household, more distant relatives outside acquaintances and officials, all to the effect that Sulaiman regarded and treated Suraiya Qadr as his lawful son. But before we proceed to examine this evidence in detail it will be useful to refer here to three pieces of evidence which go to show that Sulaiman Qadr himself acknowledged Suraiya as his son and Sarwat Mahal as his wife.

In the month of June 1900 Sulaiman Qadr was examined as a witness in a suit between two persons who were members of his own family. There is on record a certified copy of the deposition made by Sulaiman Qadr on that occasion—it is Ex. C 66. We find that Sulaiman was cross-examined in order to find out who were the members of his own family. He appears to have resented as impertinent the questions put to him in this connexion and to have answered them with considerable reluctance. He did however answer them and he swore among other things that he had a mutai wife whose name was Sarwat Mahal and from her a son whose name was Suraiya Qadr. Obviously this is a statement to which great weight must attach and indeed it might fairly be said that it is practically conclusive upon the matter which we have to decide. It cannot, we think, be argued that the fact that the statement was irrelevant for the purposes of the case in which it was given, or the fact that it was made unwillingly, serve in any way to detract from its value. On the contrary we should say that its value is, if possible, enhanced by its having been made under these conditions. There can be absolutely no reason for suspecting it to have been false—there was no object to be served by the making of a false statement and there was at that time no dispute between the members of Sulaiman's family as to the status either of Suraiya or of his mother Sarwat Mahal. All that has been suggested by the opposite party is a theory that the statement made by Sulaiman was for him inevitable inasmuch as he had years before married Suraiya into the family of the ex-King of Oudh, Wajid Ali Shah, under false pretences and was therefore under an obligation to support the imposture which he had carried out already. At present we need only say that this theory appears to be without any substantial foundation. We shall have occasion to refer to it again in a later portion of this judgment.

The second piece of evidence we have to notice in this connexion is the statement of Prince Qamar Qadr who was examined as a witness on commission. This gentleman is now the head of the ex-Royal Family in Calcutta and first made the acquaintance of Suraiya Qadr when the latter was brought to Calcutta to be married to a lady whom Qamar Qadr asserts to have been a daughter of ex-King Wajid Ali Shah and his (Qamor Qadr's) own sister. Qamar Qadr took a prominent part in the marriage ceremony and decorated Suraiya with the wedding chaplet (sihra). He swears that Sulaiman introduced Suraiya to him saying: "This is my son and he is your cousin."

We can see no reason for doubting the truth of this statement.

The third piece of evidence of this kind is the statement of the lady doctor, Miss O'Brien. She has deposed to her having treated Sarwat Mahal in the life-time of Sulaiman Qadr and to the latter's having introduced Sarwat Mahal to her as his wife.

So much for direct evidence of declarations made by Sulaiman Qadr regarding the position he occupied with respect to Sarwat Mahal and Suraiya.

To turn now to general evidence of treatment it is important to observe by way of preface that the witnesses put forward both by the plaintiff and defendant 1 have been constrained to admit that Suraiya Qadr was treated by Sulaiman as his son. We have for example the statement of Jafar Ali Khan, the husband of the plaintiff (P. W. 14), that .Sulaiman treated Suraiya in the same way as he treated Humayun Qadr. Sayyid Ali (P.W. 5) says the same thing though he has qualified his statement to a certain extent and so does Muhammad Abbas (P. W. 6), a man who was in the service of Humayun Qadr for about 20 years. This man says that Humayun always treated Suraiya as a brother until the present suit was filed. Other witnesses for the plaintiff depose in the same strain, e. g. Sayyid Husain (P. W. 9), and Amir Husain (P. W. 15). Again, among witnesses who appeared for either defendant 1 or 2 we have Sajjad Ali, Sayyid Muhammad Husain, Sayyid Murtaza and Asaf Mirza who testify to Sulaiman's treatment of Suraiya as a son. The second of these has sworn that Humayun and Suraiya were treated alike, so has the third who adds that Sarwat Mahal was treated as a wife. The fourth man, Asaf Mirza, who is clearly a partisan and most of whose evidence lies under the suspicion of being false, stated that Sulaiman was fond of Suraiya Qadr, treated him as a son and allowed him to manage his affairs.

This last mentioned fact is deposed to by other witnesses and is also supported by documentary evidence.

In view of these admissions proceeding from hostile witnesses we are relieved from the necessity of a close examination of the evidence of treatment led on behalf of Suraiya Qadr. We are content to mention the names of a few of the witnesses some of whom are persons whose disinterestedness and veracity are admittedly above all suspicion. Mr. Hamid Ali Khan, a barrister and a man of high character, states that Sulaiman behaved as a father to Suraiya; so does Jafar Ali Khan, a member of the Shish Mahal family. Wasid-ud-din (D. No. 3, W. No. 17) deposes to having written a letter to the authorities on behalf of Sulaiman asking them to appoint his son Suraiya as one of the trustees of the Husainabad Endowment. We may notice also the evidence of the Raja of Mahmudabad, the Raja of Jahangirabad, Fagfur Mirza, Shamsud-ud-din Haidar and the Abu Sahib. The last three gentlemen are all connected with the Royal Family to which Sulaiman belonged. All of these gentlemen had opportunities of observing the treatment given by Sulaiman to Suraiya and they all depose to their firm conviction that Suraiya was Sulaiman's son by reason of the treatment which they had occasion to notice.

We may refer also to the statement of a lady which was recorded on commission, one Abbasi Begam. She is a sister of the defendant Ruqaiya Begam and admits that she regarded Sarwat Mahal as a co-wife and rival of her sister. It may be taken, therefore that there is upon record an abundance of evidence a good deal of it unimpeachable, which goes to show that for a very long period and up to the time of his death Sulaiman regarded Suraiya as his legitimate offspring. Regarding Sarwat Mahal's position the evidence, as we might expect is not so ample. Being a pardanashin lady she was removed from the society of the world outside the house and there would be no opportunities for people outside the family to observe on what footing she was treated. But there is as already noticed, some evidence to show that she was regarded as a wife though not of course accorded the deference due to the first defendant, the Khas Mahal and nikahi wife of Sulaiman Qadr.

The witnesses for the plaintiff and defendants 1 and 2 having acknowledged the treatment of Suraiya as a son, we have now to deal with the attempt made to explain why these admissions were made. It has been sought to show that this course of treatment first became evident at or about the time Suraiya was married to a girl in the household of the ex-King Wajid Ali Shah in

Calcutta. The date of this marriage is uncertain : the most reliable statement regarding it is that of Prince Qamar Qadr, a son of the ex-King, who was undoubtedly present at the ceremony. He speaks of it as having taken place some 30 or 32 years previous to 1911, thus fixing the date somewhere between 1879 and 1881. According to this chronology the evidence of these witnesses imports that Sulaiman treated Suraiya as his son for a period of about 30 years: Sulaiman died in 1910. The story goes then that Sulaiman first began to make a display of fatherly affection for Suraiya about the time of this marriage and it is said that it was then he first received the title of Suraiya Qadr by which he is now generally known. In order to make the story a trifle more complete and convincing it is added that Suraiya's mother, hitherto known as Aghai Khanam was at or about the same time honoured by the bestowal of the more dignified title of Sarwat Mahal. Unfortunately for those who have committed themselves to this tale the latter portion of it had been demonstrated to be quite false.

There is on record a sort of Court journal, called Wardi Deorhi, in which are chronicled the daily movements of the members of Sulaiman's household in the year 1873 and some of the entries in this journal prove that in that year Suraiya's mother was known as "Sarwat Mahal Sahiba" and had as a recognized wife of Sulaiman a separate establishment of her own (mahal) : (cf. Exs. S14 S15, S17, S18, S19, S22 and S25, all of them entries in the journal). It does not appear that Suraiya however was known by that name in those days. Humayun and himself seem to have been styled "Manjhle Nawab" and "Nawab Mizra Sahib" respectively — "Manjhle" being the appropriate expression to be applied to the middle one of three sons. It is admitted that there was an elder son who died a long time ago. To return to the story as it is put we are told that this conduct of Sulaiman is taking special notice of Suraiya and his mother was prompted by a desire on his part to carry out a marriage between Suraiya and lady in the household of the ex-King at Calcutta. Humayun had already been married to a daughter of the ex-King and information had been received that there was a young lady in the family who would do for Suraiya. She was not according to the story, of the same status as Humayun's wife being only "reported to be the daughter of the King" but she was good enough for "Nabbu" as Suraiya was then called (see the evidence of Qudsia Begam). Sulaiman accordingly went to Calcutta, passed off "Nabbu," now Suraiya Qadr, as his real son and had the marriage with this "reputed" daughter of Wajid Ali Shah celebrated with a good deal of display. After his return it is said he called some of the members of the family together, acknowledged the imposture he had perpetrated and exhorted them . to treat Suraiya from that time as his (Sulaiman's) legitimate son as otherwise he (Sulaiman) would be "put to shame among the Calcutta people: " see the statement of Qudsia Begam.

This tale, a portion of which as we have already said is proved by documentary evidence to be false, rests upon the evidence of certain members of the family who are deeply interested in the result of the present suit. One of the witnesses who supports it is Jafar Ali Khan, the husband of the plaintiff, a gentleman who although he has quarrelled with his wife is probably stimulated by a lively sense of benefits to come if his wife's share of the inheritance is increased by exclusion of Suraiya Qadr. The other witness is the plaintiff herself whose statement, in a matter of this kind, could not be accepted without the strongest corroboration. The other persons who are said to have been present at this family council appear to be dead. It seems remarkable, we observe, that Sulaiman did not take his principal wife, Khas Mahal, into his confidence in this matter. One would imagine that if Sulaiman desired to maintain the imposture he would have endeavoured to secure the good offices of his wife, the principal lady of the family. It seems fairly certain that if he practised the deceit imputed to him his wife would come to know of it eventually and would in all probability make trouble. There was all the more reason therefore for him to make counsel with her. The story on the face of it is quite an incredible one and like many a false story concocted for reproduction in Court it has been spoiled in the telling, for it is difficult

to conceive why Sulaiman should have gone to all this trouble to foist a bastard son of his upon the Calcutta family if as we are now told, the woman to whom Suraiya was married was no daughter of the ex-King of Oudh but a mere "lepalak"—the child of some menial who had been adopted and brought up by Mahbub Mahal, one of Wajid Ali Shah's numerous mutai wives. For as we have already noticed, it had been reported before the marriage that the girl was not a daughter of the King— she was only reputed to be so.

There is we may say a curious conflict of evidence as to the status of the girl who was married to Suraiya Qadr. While on the one hand we have the statements of Prince Bamar Mirza Mohammad Muqim, a grandson of Wajid Ali Shah, and of Prince Qadr, the King's son that the girl was the King's daughter, we have the evidence of three wives of the King to the effect that she was not. One of these ladies, Nawab Kaisar Mahal, went to the length of denying that Suraiya's wife ever got any allowance from the King, but the others admit that she did and it is proved by documentary evidence, and not denied by witnesses who belong to the household at Lucknow, that Suraiya's wife so long as she lived used to be sent a monthly allowance by the King. We think we ought to accept in this matter the positive evidence of Qamar Qadr whose disinterestedness in the matter is quite clear. It proves that the girl was treated as the King's daughter (Qamar Qadr sepeaks of her as his sister), that she got the customary dowry at her wedding, that the King defrayed certain expenses of the marriage, that he gave her an allowance for years, that Qamar Qadr represented his father at the ceremony, in short that the girl was treated in all respects as a daughter of the Royal Family. We have no doubt whatever that the status of the lady who married Suraiya was every whit as good as that of the lady who had previously been married to Humayun and we dismiss as being untrue this story of imposture attributed to Sulaiman in connection with Suraiya's marriage. It is a futile attempt to explain a long course of conduct on the part of Sulaiman which is capable of a natural explanation. Acts of fatherly treatment would be more frequent and conspicuous as Suraiya rose to manhood's estate. He would be given a more formal title and would be introduced to the outside world. He would be provided with an allowance and entrusted with duties in connexion with the managament of his father's affairs. And this is exactly what we find.

We hold that the evidence before us establishes that Suraiya was brought up in the house of his father and educated with his brother Humayun, that in his younger days he was called by a name of affection, "Chhote Sahib or Chhote Huzur", just as his brother Humayun was called "Manjhle Sahib," that later on he was given the title of Suraiya Qadr—"Qadr", be it noted, is a distinctive name given to members of the royal house—that he was married into the same family as Humayun, that he was openly treated as an equal with his brother that he received an allowance, was entrusted with the management of some of his father's affairs and was introduced into society as Sulaiman's son. We also have it on the authority of some witnesses that Sulaiman displayed great affection towards a son of Suraiya's who died during boyhood and was interred in the Imambara which was consecrated by Malka Ahad, the mother of Sulaiman.

We hold therefore that the only proper conclusion to be drawn from these facts is that Suraiya is the legitimate son of his father. The law on the subject is well understood and has been explained in numerous cases of which we need mention only two, namely *Khajah Hidayut Oollah* v. *Rai Jan Khanum* (1) and *Mahomed Bauker Hoossain Khan Bahadoor* v. *Shurfoon Nissa Begum* (2). In these cases it has been laid down by their Lordships of the Privy Council that according to Mahomedan law the legitimacy or legitimation of a child of Muhomedan parents may properly be presumed or inferred from circumstances without proof, or at least without direct proof, either of a marriage between the parents or of any formal act of legitimation. There is, in our opinion, for the reasons already given an abundance of circumstances in the present case to justify the inference that Sarwat Mahal

(1) [1841-46] 3 M. I. A. 295=1 Sar. 282 = 18 E. R. 510.
(2) [1859-61] 8 M. I. A. 136=3 W. R. 37= 1 Suth. 400=1 Sar. 728=19 E. R. 481. (P.C.).

was the wife of Sulaiman Qadr and that Suraiya Qadr is his lawful son of that lady. In this state of things it was for those of the parties who denied the status of Suraiya and his mother to produce strong and conclusive evidence to rebut the presumption of a lawful connexion, and we have now to deal with that part of the case in which an attempt was made to establish the existence of an insurmountable legal obstacle to any legitimate union between Sulaiman and Sarwat Mahal. If the existence of any such obstacle is proved the presumption must admittedly give way.

The Mahomedan law, like other systems of law, has made rules for the restriction of marriage between parties related either by blood or marriage. But it has also laid down a ground of prohibition peculiar to itself, namely connexion by fosterage. The facts which constitute this peculiar connection or relationship among those who are governed by the Shia law (as the parties here are) are stated in Baillie's Imamia Law at pp. 15 et seq. Four necessary conditions are laid down, the first being that the milk of the foster-mother must proceed from marriage and not from illicit intercourse. The second condition relates to the period of suckling. It is said that there must be either ten or fifteen complete acts of suckling or that the suckling must have continued for a day and night. A third condition is that the suckling for the prescribed number of times or for the period just mentioned must have taken place before the child attains the age of two years, and the fourth is that the milk should arise from intercourse with one male. The allegations in the present case are (1) that Sulaiman Qadr in his infancy had a wet-nurse named Sahib Khanam, (2) that at the time when this woman was suckling Sulaiman Qadr she had an infant of her own, Aghai Khanam, who was some months older than Sulaiman and (3) that this Aghai Khanam, who is no other than Sarwat Mahal, was being suckled by her mother at the same time as Sulaiman Qadr. And on these allegations rests the case that Sulaiman and Sarwat were connected by fosterage so as to render any marriage between them impossible under the Mahomedan Law. Sulaiman Qadr appears to have been born about the year 1840 A. D.

In the year 1900, when he was examined as a witness and made the declaration regarding his relationship to Sarwat Mahal and Suraiya, he gave his age as 60 years. It is apparent therefore that in the year 1911, when the evidence in the present case was being taken there could be few, if any, persons who could depose directly regarding events which took place during the first two years of Sulaiman's life. In fact there was found only one witness who ventured to give direct evidence as to the fact of Sulaiman's having been nurtured by the woman Sahib Khanam. The bulk of the evidence is of a hearsay nature, consisting principally of statements made by persons deceased, to the effect that Sahib Khanam was Sulaiman's wet-nurse (anna) though there is also some evidence which is claimed to be evidence of conduct, that is to say evidence that Sahib Khanam was treated in the famliy as a wet-nurse would be. The general rule of evidence is that hearsay is inadmissible, but the Evidence Act recognizes certain exceptions to this rule some of which are specified in S. 32. Cl. (5) of that section renders admissible hearsay evidence to prove relationship by blood, marriage, or adoption, but the clause has clearly no application to the case of fosterage even if it be assumed that connexion by fosterage can amount to "relationship" in any sense of the term. The learned District Judge was quite right, therefore in holding that the persons who were seeking to establish this particular connection between Sahib Khanam and Sulaiman Qadr could not avail themselves of this provision of the law of evidence in order to prove their case.

Whether or not they were entitled to rely upon the provisions of S. 50 of the Act is a debatable point. Under this section, when the Court has to form an opinion as to the relationship of one person to another, it may act upon the opinion, expressed by conduct, of any person who, as a member of the family or otherwise, has special means of knowledge. It is to be noted that in this section the words "by blood, marriage or adoption" do not follow the word "relationship" as they do in S. 32, Cl. (5), so that it is possible to argue that the term "relationship" in S. 50 is used in a wider sense. It may, however well be doubted whether the

expression can properly be held to include the artificial connexion between two persons arising out of fosterage—a connection which is not recognized as relationship for all purposes, e. g. inheritance, but merely as a connection which renders two persons unlawful to each other for the purpose of marriage.

However we will for the purposes of this case assume that such evidence of opinion is admissible and proceed to examine the evidence upon this understanding. Before we do so we may refer to another allegation put forward as part of the case of fosterage. It is said that Sulaiman's mother, Malka Ahad, having become aware of an entanglement between her son and Aghai Khanam, the daughter of Sahib Khanam, turned the latter and her two daughters out of the house on the ground that she apprehended an incestuous marriage between her son and Aghai Khanam, incestuous because of the fact that she was related to Sulaiman as a foster-sister.

The first witness in this matter was Sayed Ali, a man who admits that he was four years younger than Sulaiman Qadr and who could not possibly give any direct evidence as to the fact of Sahib Khanam's having suckled Sulaiman. His evidence is pure hearsay and inadmissible to prove the alleged connexion between these two persons.

The next witness, Jafar Ali Khan, can only say that he heard that Sahib Khanam was Sulaiman's foster-mother; and the third, Amir Husain, a man of no status, who asserted boldly that Sulaiman and Aghai were suckled together, must be talking pure hearsay. He was unable to give the name of the person from whom he had received the information.

Husaini Begam, an old woman of about seventy years of age who was employed in the family as a seamstress, speaks of Sahib Khanam being the wet-nurse of Sulaiman. According to her story Sahib Khanam was allotted to Ruqaiya Begam as a servant when the latter was married to Sulaiman. The witness deposes to one or more declarations made by Sulaiman's mother to the effect that Sahib Khanam was Sulaiman's wet-nurse and Aghai his foster-sister—evidence which, even if true, is inadmissible. This witness also speaks about the incident of Sahib Khanam's having been turned out of the house, but we gather that she only heard about it.

Similarly the statement of Zainab Begam as to the connexion by fosterage is nothing but pure hearsay. We come next to the statement of one Asaf Mirza who gave his age as 79 years. If, as he says, Sulaiman was older than himself this man could not have been 79 years of age at the time he gave his evidence. He speaks of having heard from Sahib Khanam herself that she was the foster-mother of Sulaiman and that Aghai was Sulaiman's foster-sister; but this evidence cannot be admitted. He then proceeds to tell his version of the story of Sahib Khanam's being turned out of the house, most of the particulars of which he appears to have learnt from Sulaiman himself. It is significant that the witness did not attempt to say that Sulaiman made any admission of a connexion between himself and Sahib Khanam or her daughter. But we need not go into details of the story told by this man, for his version of the affair is altogether different from that told by other witnesses and he broke down completely in cross-examination, particularly in the matter of the date of Suraiya Qadr's birth which he fixes much later than the Mutiny. Altogether the evidence of Asaf Mirza may safely be discarded; there are abundant indications that his evidence is false.

We have next the statements of certain witnesses taken on commission—the first being that of Khurshed-un-nisa who gave her age as 56. This woman could not possibly have any direct knowledge of any connexion between Sulaiman and Sahib Khanam. Her evidence is hearsay and inadmissible. We may also say that she appears to have been tutored to give evidence. When she was asked if she knew Sahib Khanam she replied by asking a question, "Do you mean Sahib Khanam the wet-nurse?"—a circumstance which demonstrates pretty clearly that she went before the commissioner fully primed with a prepared story. We shall have occasion to notice presently similar indications of tutoring in the depositions of other witnesses.

The next witness is an elderly person named Nawab Muhammad Hussain Khan who gave his age as 86 or 87. He is the only witness who professes to have seen Sahib Khanam giving suck to

Sulaiman and he also deposed that Aghai Khanam was being nursed by her mother at the same time. In cross-examination however he tripped up and said that Aghai Khanam had a wet-nurse of her own. He also stated contrary to other witnesses that Sulaiman had only one wet-nurse and not two. He describes himself as having been about thirteen or fourteen years of age when he saw Sulaiman being nursed, but it is remarkable that he appears to have been quite unable to recall any of the events of his own life except those which happened in his childhood. He protested that he was unable to give any account of his own domestic history or affairs, but sufficient evidence in this connexion was extracted from him to show that he is a pauper—a person to whom the temptation to sell his evidence for a few rupees would in all probability be irresistible. He left the witness-box complaining that he was being allowed to go without his having been asked to say all he knew about Aghai Khanam and full of regret no doubt that he had not had the opportunity of pouring out the story he had prepared and for which in all likehood he had been paid either in cash or promises.

We may notice here that even if we were to accept as gospel the direct evidence of this witness it falls very far short of proving the fulfilment of the four conditions necessary to create connexion by fosterage. Abbasi Begam is the next witness. She is a sister of defendant 1, Khas Mahal. Her evidence on the question of fosterage is nothing but hearsay. After her we come to the deposition of Khas Mahal herself who speaks of Sahib Khanam's having been appointed her servant at the time of her marriage. She has no direct knowledge of Sahib Khanam's having been Sulaiman's foster-mother and her story of Sahib Khanam's dismissal from the house does not square with the version given by other witnesses. Asked to state on what grounds she considered Sahib Khanam to be her husbands's wet-nurse she stated: "My mother-in-law introduced her to me as that and at her direction I used to salaam her and call her that. She used to get hissa bakhri. She lived with me." Hissa bakhri we understand is a share of refreshments handed out on ceremonial occasions. This evidence will not serve as proof of fosterage. We come last of all to the deposition of an elderly woman. Zakia Begam, who describes herself as having been related to Sulaiman. She is another of the witnesses who, when she was asked in examination-in-chief if she knew Sahib Khanam replied by asking the significant question, "Do you mean Sahib Khanam the wet-nurse?" Her statement to the effect that Sulaiman and Aghai Khanam shared the same milk is pure hearsay and she also deposes to .statements made by Sahib Khanam herself as to her being Sulaiman's foster-mother—statements which cannot be received in evidence. Her story regarding the dismissal of Sahib Khanam and her daughters appears to be based upon hearsay. Zakia Begam seems to be an unreliable witness: she admits relationship with a person called Sardar Sahib (father-in-law of Humayun Qadr's son) who appears to have been acting as a pairokar in the case on behalf of Humayun Qadr.

We have now surveyed the whole of the evidence led by the parties who were interested in making out the existence of the bar of fosterage as a legal obstacle to any lawful union between Sulaiman and Sarwat Mahal, and all we have to say is that the bulk of it is inadmissible, that such of it as is admissible is probably untrue, and that even if true it does not constitute proof of the case it was intended to establish. We turn now to notice the case put forward in support of the appeal of defendant 1 to show that Sarwat Mahal and Sulaiman were not united in any lawful bond of marriage. The case rests upon the pleas raised in the written statement filed on behalf of Sarwat Mahal and in particular upon one statement contained in para. 8 of the defence to the effect that when the contract of temporary marriage was entered into there was no specification of the period for which the union was to last. Stress has also been laid upon the fact that in her defence Sarwat Mahal makes no mention of any agreement relating to dower. It is contended that as a principle of Shia law a mutai marriage in which no dower has been fixed and for the duration of which no time has been specified is void and in support of this argument certain texts in Arabic taken from the works of com-

mentators have been filed before us with translations. A printed copy of the texts with the translations is on the record. Taking the texts as they stand they disclose a difference of opinion among the learned jurists who have sought to interpret the language of the leading work on the Shia law, the Sharaya-ul-Islam. It seems to be agreed that when a temporary marriage is contracted there ought to be an agreement for a definite amount of dower as also for a definite period of time. It seems also to be accepted that if there is no definite agreement touching both these matters the contract is void. Further it is said that the failure to specify dower renders the contract void.

With respect to the case in which there has been an omission to specify the period opinions differ. The older school maintain that a mutai marriage entered into without a stipulation for a definite period is tantamount to a nikah or permanent union. Later commentators declare on the contrary that there is no valid union at all. It is not, we think, necessary for us in this case to discuss the merits of these conflicting views of the law; for as matters stand it is impossible for us to say that we have any proof before us either that no period was fixed or that no sum was agreed upon as dower. We are asked to deal with the matter merely upon the allegations to be found in Sarwat Mahal's statement of defence, to accept these allegations as conclusive and to find that Sarwat Mahal was not a lawful wife and that her son Suraiya is a bastard. This we must decline to do. We have already adverted to the fact that these allegations are contained in a statement of defence signed and verified not by the lady herself but by a general agent of hers. It is possible that these assertions may not have proceeded from the lady herself, and we have the fact that the lady did not give evidence which might have supported or qualified these assertions. We have already mentioned that Sarwat Mahal was not in all probability in a fit state to enter the witness box; but whether that be so or not we could not possibly give the go-by to the large volume of evidence relating to the treatment of Suraiya Qadr and declare him illegitimate upon a bare allegation to be found in the written statement filed on behalf of his mother. If, as their Lordships of the Privy Council have held, the legitimacy of a child of Mahomedan parents may be established from circumstances without direct proof either of a marriage between the parents or of any formal act of legitimation, it seems clear that in the case before us, where there is no direct proof of marriage, Suraiya Qadr can properly claim to have his status determined in acordance with the general evidence of treatment and acknowledgment put forward on his behalf and irrespective of any allegation made by or on behalf of his mother in her written statement. If that evidence proves, as we hold it does, that Suraiya was a lawful son of Sulaiman, we must give effect to the conclusion to be drawn from it for the benefit of Suraiya Qadr. This conclusion necessarily involves the further conclusion that there was a lawful union between Sarwat Mahal and Sulaiman. What the precise status of Sarwat Mahal was is a matter still to be considered and a matter which concerns Suraiya Qadr only to this extent: namely that if it be found that his mother was a nikahi wife her right to dower and inheritance is established, with the result that now after her death Suraiya Qadr would be entitled as her heir to something out of the estate over and above what he can claim as an heir of his father. What then was the status of Sarwat Mahal as a wife?

An attempt was made to prove on her behalf the plea contained in para. 10 of her written statement to the effect that a contract of nikah was entered into between her and Sulaiman in January 1901. We can dispose of this part of the case briefly—particularly as the learned advocate who supported the case for Suraiya Qadr was constrained to admit his inability to maintain that the evidence put forward to prove this marriage was either credible or convincing. We are asked to believe that at two o'clock in the morning of a day in January 1901, after the close of an entertainment at which many of his friends had been present it suddenly came into the mind of Sulaiman to contract a nikah with Sarwat Mahal. For this purpose he sent out and had fetched to his house a man named Ali Mian and a relative of Ali Mian's to assist at the ceremony. Ali Mian is a man of no status who appears to earn a pre-

carious living by selling pigeons and fowls. He may, as he says, belong to a family of Mujtahids and he may be licensed or commissioned to celebrate marriages between Mahomedans, but we feel certain that he is not the sort of man whose services as a priest would have been sought by a person in the position of Sulaiman Qadr. It has been suggested that Sulaiman must have desired to keep the marriage secret but it is difficult to understand why this should be so. If he wanted to give Sarwat Mahal a higher status in the family—a status which would entitle her to dower and inheritance—we should rather assume that he would give full effect to his generous intention by having the ceremony done publicly and in proper form. We should have expected him to have a formal record made of the event and to see that a deed of marriage and a deed of dower were duly executed. On the other hand if it can be assumed that there was any occasion for a clandestine marriage is it not more likely that Sulaiman would have felt that his secret would have been safer in the keeping of a priest of standing accustomed to attend the ceremonies in the Royal household than with an obscure and impecunious individual like Ali Mian ?

It is true that apart from the direct evidence relating to this alleged nikah (evidence which we discard as wholly unreliable) there is some evidence to show that Sulaiman subsequently admitted that this nikah marriage had been carried out. There is the statement of Kaisar Mirza, the gentleman in whose case Sulaiman was examined as a witness in the year 1900 when he made the statement, Ex. C-66, to which reference has already been made. Kaisar Mirza deposes to a conversation between himself and Sulaiman said to have taken place about a year after the date of Sulaiman's examination in Court. In the course of that conversation Sulaiman is said to have let drop a remark to the effect that he had two nikahi wives, whereupon the witness expressed surprise inasmuch as a year before in Court Sulaiman had sworn he had only one. Sulaiman then explained that since the date of his giving evidence he had entered into a nikah contract with Sarwat Mahal. The story is an artistic one but it is difficult to resist the conclusion that it has been concocted for the purposes of this case. We suspect it to have been shrewdly produced by Kaisar Mirza by way of a discharge of the obligation he owed to the memory of a man who had come to his assistance once by giving evidence in his favour.

The other witness on this point was Faghfur Mirza, a gentleman whose veracity has not been impugned. But his statement does not show any admission relating to this nikah marriage made by Sulaiman. All he was able to say was that he had heard of the marriage from an old servant of the family.

We hold that the Court below was right in finding that there was no proof of nikah between Sulaiman and Sarwat Mahal in the year 1901 : we do not believe that any such union took place.

It has however been argued that independent of any proof of the ceremony alleged we ought to award to Sarwat Mahal the status of a nikahi wife by reason of the doctrine contained in the Arabic texts which have been alluded to above. We are asked to hold that because no period of muta was fixed Sarwat Mahal became the nikahi wife of Sulaiman in accordance with the dicta of what we have called the older school of commentators. The answer to this argument is that even if we were prepared to accept this older doctrine, we should not be able to apply it herefor the simple reason that there is no proof of the allegation that the mutai contract was executed without any stipulation for a definite period. In order therefore, to determine the position allotted to Sarwat Mahal in the family we have to fall back upon the general evidence of treatment. Obviously this evidence could not be so direct and specific as in the case of Suraiya Qadr. The lady living in the seclusion of the parda, there could be but little direct evidence of acts of treatment, and such evidence taken for all it is worth would scarcely enable us to ascertain whether Sarwat was a mutai or nikahi wife. But we have the solemn declaration of Sulaiman contained in his deposition made in the year 1900 (Ex. C66), to the effect that Sarwat Mahal was his mutai wife and this we must take to be conclusive evidence in the matter in the absence of other evidence to prove her advancement to higher rank subsequent to the date of the declaration.

Our findings therefore on this part of the case are: (1) that Sarwat Mahal was the mutai wife of Sulaiman Qadr; and (2) that Suraiya Qadr is the legitimate son of Sulaiman Qadr by Sarwat Mahal.

Having thus decided the questions of the status of Suraiya Qadr and of the nature of the relationship existing between Sarwat Mahal and Sulaiman Qadr we proceed to dispose of the other matters raised in the three appeals before us. And first we will deal with Suraiya Qadr's appeal (No. 67 of 1912), premising that the grounds set out in para. 1, 4, 9 and 14 of the memorandum of appeal have not been pressed. The plea raised in para. 15 relates to a question of court-fees and the same point is taken in para. 9 of the memorandum of appeal filed by Qudsia Begam (No. 86 of 1912). We shall deal with this at a later stage. In para. 2 of Suraiya's memorandum of appeal the point raised is that the lower Court was in error in awarding habua to defendant 2, or rather to the representatives of defendant 2 who died before judgment was delivered.

According to the Shia law the eldest male child of the deceased is entitled to get certain articles of property to which the collective name of habua is given. These articles are the Quran, sword, ring and body-clothes of the deceased, and the idea seems to be that these things devolve after the fashion of heirlooms. The contention raised before the lower Court was that as Humayun Qadr was not the eldest son of Sulaiman he was not entitled to receive these articles.

It is true that Humayun had an elder brother who predeceased him, but he was the eldest surviving son at the death of his father, and we think the Judge was right in holding that Humayun's title to these items of property was vested and passed upon his decease to his only son Mirza Muhammad Asghar Ali.

In appeal here the right of this gentleman to receive the habua has not been seriously contested, .but it has been suggested in the course of the arguments that the directions contained in the decree as to the disposal of these articles are not sufficiently definite. The decree sets out that the representatives of Humayun Qadr will get "the personal effects of the deceased as habua, viz. his sabre, Quran, signet-ring and personal clothing." It has been explained that the property left by Sulaiman includes a number of Qurans, swords and rings; we have also been informed that there is a large amount of clothing.

We take it that the intention of this provision of the law relating to habua is not that the eldest son should receive any larger share of the inheritance but merely that he should as head of the family after his father's decease receive some special marks of favour.

The sword and the Quran ordinarily used by the father and the signet-ring and the garments ordinarily worn by him are treated as insignia pertaining to the office of head of the family.

We presume that the learned Judge by his decree merely meant that the representative of Humayun Qadr should receive the various articles of these descriptions which were ordinarily used or worn by Sulaiman Qadr, and we do not think there is any occasion for us to disturb the decree further than by adding something to show that Mirza Muhammad Asghar Ali is to receive only the sword and Quran which Sulaiman Qadr ordinarily used and the signet-ring and clothes he ordinarily wore. Which of the articles left by Sulaiman Qadr fall within this category is a matter which we must leave to be determined in the execution department.

The third, fifth, sixth, seventh and eighth grounds of Suraiya's appeal relate to the status of Sarwat Mahal, a point which we have already determined. For the reasons given we hold that Sarwat Mahal was the mutai wife of Sulaiman Qadr and that her status as such gave her no right of inheritance. With regard to the plea taken in the eighth ground the complaint is made that the Judge improperly refused an adjournment to allow of the examination of one Mirzai Khanam, the sister of Sarwat Mahal. With regard to this all we need say is that we think the order of the Judge was perfectly right. There was plenty of opportunity for the production of this woman. The examination of witnesses on commission was spun out to an inordinate length as we have already mentioned, and we are satisfied that the Judge acted properly in intervening to put an end to a scandalous waste of time. It has not been made apparent to us in any way that the evidence of this woman would have been of any particular advan-

tage, for it has never been suggested that she had any direct knowledge regarding the alleged contracts of muta and nikah. So far as we can judge she could not at most have given anything but general evidence of treatment, and of this there is abundance.

In ground 11 the plea is taken that the Court below should have awarded a reasonable dower to Sarwat Mahal. She claimed a lakh and a quarter of rupees on this account, basing her claim upon the contract of nikah alleged to have been entered into in the year 1901. We have already found that there was no proof of such a marriage and the learned Judge was in our opinion right in rejecting the claim. We may notice also that in the written statement put forward on behalf of Sarwat Mahal there was no claim for dower in respect of the mutai marriage there was no allegation that any dower had been fixed at the time of this union.

The twelfth ground of appeal relates to the alleged oral will which Sulaiman is said to have made in favour of Suraiya just before his death. We agree with the finding of the Judge that there is no adequate proof of such a will. The only witness who came forward to depose in this connexion was one Hamid Ali Khan who is married to a daughter of Asaf Mirza, the eldest son of Sulaiman. His evidence is extremely vague and he admitted that he had no clear recollection of the alleged bequest. As the learned Judge points out the account of the will given by this witness does not square with what is set out regarding it in the written statement filed by Suraiya Qadr. It appears that Sulaiman's mother Malka Ahad executed a will by which among other things she provided a trust fund for the perpetual maintenance of an imambara and the celebration of certain ceremonies. Sulaiman was the administrator of this trust, and it is not unlikely that before his death he may have expressed some wish as to the manner in which his duties as administrator should be carried on after his decease. But this is a matter which is to be settled with reference to the terms of the will of Malka Ahad, a matter with which we are in no way concerned here. We find then that there is no proof of the oral will set up by Suraiya Qadr.

The next matter we have to consider is the alleged gift in virtue of which Suraiya Qadr set up a claim to certain immovable property (houses and shops) which he said his father had transferred to him. The date of this alleged transfer by gift was not mentioned in the written statement, but it was stated afterwards that the gift was made in the year 1885. The two principal witnesses in this connexion were Brij Behari Lal and Fida Ali who swore that Sulaiman declared the gift in their presence. According to Fida Ali the gift was made at the suggestion of Suraiya who complained that his elder brother, Humayun Qadr, was getting an allowance of Rs. 75 a month, while he himself was being allowed only Rs. 50 per mensem. Sulaiman agreed therefore to give Suraiya these houses and shops which brought in a rental of Rs. 25 a month.

A number of witnesses were produced to prove payments of rent made by them to Suraiya on account of occupation of these houses and shops and certain documents were produced, principally "sarkhats or rent-notes" executed by tenants in favour of Suraiya Qadr. This evidence however is far from conclusive to prove that Suraiya was the owner of this property. It is an admited fact that for years Suraiya was entrusted with the management of his father's affairs and the payments deposed to may very well have been made to him in his capacity as manager or agent of his father—indeed some of the sarkhats relied upon would go to establish this very fact. Further, as the Judge points out, there is documentary evidence to show that in February 1888 the rents of some of these shops in Nakhas and Amaniganj were credited to the account of Sulaiman Qadr (cf. Ex. P-144), and one witness was able to prove the execution of a sarkhat in favour of Humayun Qadr for one of the shops claimed to have been transferred by gift. The Judge came to the conclusion that what took place was that Sulaiman, in order to raise the monthly allowance of Suraiya to the amount enjoyed by Humayun, made an arrangement by which Suraiya was to receive the rents of this property without ever intending to pass the property absolutely to him, and we think this is the proper inference to be drawn in view of the statement made by the witness Fida Ali. We should not be justified in relying upon the testimony of Brij Behari and

Fida Ali, the former of whom is evidently a strong partisan, so as to hold that Suraiya is the owner of these houses and shops by virtue of the alleged gift.

The only other point raised in Suraiya's appeal is with reference to the one lakh of rupees allowed by the Court below to defendant 1 in satisfaction of her claim or dower. The contention on behalf of Suraiya Qadr is that the sum so awarded is excessive.

Defendant 1, Ruqaiya Begam, on the other hand, in her appeal has raised the plea that the sum awarded on this account is inadequate. We can therefore deal with this matter which is the only one left for decision in the appeal of defendant 1. The only other point raised in her appeal, namely the legitimacy of Suraiya Qadr, has been decided against her.

The case for Ruqaiya Begam was that her dower had been settled at 25 lakhs of rupees. Possibly it was, but there is no manner of doubt that she cannot now recover that sum or anything like it. As was remarked by their Lordships of the Privy Council in the case reported as *Suleman Kadr* v. *Mehdi Begum Surreya Bahu* (3)—a case of dower between this very Sulaiman Qadr and another of his wives—a contract by a man in the position of Sulaiman Qadr to pay an enormous sum like this was "a mere piece of bravado, allowed or possibly required by custom but never intended for actual fulfilment." Under S. 5, Oudh Laws Act, the Courts are vested with a discretion to regulate the amount of dower with reference to the status of the wife and the means of the husband in cases where, as here, the amount stipulated for in the contract is excessive.

In the case just referred to a claim for dower was brought against Sulaiman Qadr by one of his nikahi wives, Suraiya Bahu. The lady was of high status, being a member of the Royal Family of Oudh, and her dower had been fixed at ten lakhs of rupees together with a monthly allowance of Rs. 150. She got a decree for Rs. 25,000 which their Lordships in the circumstances considered an adequate amount. Sulaiman in that case had estimated his property as being worth Rs. 60,000 while he had in addition an income of nearly Rs. 3,000 a month. So far as status goes there is no distinction between Suraiya Bahu and the lady with whose case we are dealing here—though we agree with the Judge in thinking that Ruqaiya Begam has perhaps a stronger claim by reason of the fact that she is Khas Mahal or senior spouse of Sulaiman Qadr. The learned Judge had recorded that the value of the property left by Sulaiman had been estimated at about seven lakhs of rupees—excluding the immovable property consisting principally of the large family residence in the city of Lucknow, the value of which may be close on two lakhs of rupees—and having regard to all the circumstances he has awarded one lakh of rupees by way of dower, that is to say four times the amount which was decreed to Suraiya Bahu. He has referred to one very material piece of evidence in this connexion. It appears that at or about the time when Suraiya Bahu brought her claim Ruqaiya Begam was minded to bring a similar suit and in order to enable her to prosecute her case (which was however never instituted) she sold a 6/16th share of her claim to her son-in-law, Jafar Ali Khan, for Rs. 7,000. We are satisfied therefore that Ruqaiya Begam has been liberally dealt with in this matter and that there is no sufficient ground upon which we could be called upon to interfere with the lower Court's discretion. We cannot accede to the argument that the Judge should have awarded a specified fractional share of the estate in satisfaction of the dower claimed or that he should have delayed his decision of the question pending a precise valuation of the property left by Sulaiman Qadr. The value of the estate has been ascertained with sufficient accuracy to enable a definite sum to be allotted and we think the Judge acted very properly in settling a lump sum in order to avoid the possibility of further disputes. We observe that in Suraiya Bahu's case their Lordships expressed approval of this procedure and we consider the precedent was wisely followed in the present instance.

We hold therefore that Ruqaiya Begam is not entitled to anything more on account of dower than she has been allowed by the Court below.

With regard to the remaining appeal, that of Qudsia Begam (No. 86 of 1912),

(3) [1894] 21 Cal 135=20 I. A. 144 (P. C.).

we have already decided the question of Suraiya Qadr's legitimacy, which is raised on her behalf, and are left with only two points to be determined. One of these relates to the direction given by the Judge with respect to the obsequies of Sulaiman Qadr. The Judge has ordered a sum of Rs. 15,000 to be set aside for this purpose—namely Rs. 5,000 for conveying the body of the late Prince to Karbala and Rs. 10,000 for the performance of ceremonies at his tomb in that place. He has also ordered that this sum should be made over to Suraiya Qadr to whom he has entrusted the duty of carrying out the objects for which the above sum has been allotted.

It is not seriously disputed that arrangements of this nature are necessary, nor has it been strongly argued that the sum which the Judge has appointed is excessive regard being had to the status of the deceased. But on behalf of Qudsia Begam it is objected that Suraiya Qadr is not a proper person to be appointed for the discharge of these pious duties. We are unable to entertain this objection. Having found that Suraiya is the legitimate offspring of his father, that he was treated by his father with respect and consideration and that for a considerable time he was entrusted with the management of his father's affairs, we think that he is clearly the proper person to whom these duties should be delegated. He is now the eldest surviving son of his father's, the person who in the ordinary course would be under the obligation to attend to his father's funeral ceremonies.

We think it proper however to direct Suraiya Qadr to furnish security for the performance of these duties and for the due expenditure of the money allotted for these purposes and direct him to execute a bond for Rs. 15,000 with two sureties in favour of the District Judge of Lucknow binding himself to carry out his duties within such period and in such manner as the District Judge may, after such inquiry (if any) as he may deem necessary, consider reasonable.

We have now to deal with the question of the proper court-fee leviable upon the plaint in this suit. In para. 5 of the plaint it was stated that the plaintiff was unable to give any accurate estimate of the value of the property left by Sulaiman Qadr, but that for purposes of jurisdiction she valued the property at 50 lakhs of rupees. It was further stated that as it was impossible to assess the value of the relief claimed, a court-fee of Rs. 10 was being paid in accordance with the provisions of Art. 17, Cl. 6, Sch. 2, Court-fees Act, 1870.

In para. 6, Cl. (1) of the plaint, the particular relief claimed, as originally stated was as follows: "That the moveable and immovable property left by the late Prince Sulaiman Qadr, aforesaid, be administered by the Court, and for this purpose all proper directions be given and account taken under O. 20, R. 13, and the forms Nos. 17 and 20 App. D, Civil P. C."

Subsequently, on 12th June 1911, a prayer for alternative relief was added as follows: "Or if the Court is unable to administer the estate then (it is prayed) that the said property be partitioned and a 17/24ths or such share of it as she may be proved to be entitled to be awarded to the plaintiff."

An issue was raised as to the sufficiency of the court-fee, and on 12th June 1911 the District Judge held that in view of the uncertainty as to the value of the property left by the prince and having regard to the various disputed claims before him it was impossible to state even approximately the value of the plaintiff's share. He found accordingly that the plaint was sufficiently stamped with a Rs. 10 stamp.

When he came to write his judgment the learned Judge expressed his opinion that the plaintiff's suit was in reality one for an account and that it had been so treated by all parties throughout the trial. He held therefore that as the estate was valued at 7 lakhs of rupees the maximum court-fee of Rs. 3,000 was leviable and he directed that the deficiency of Rs. 2,990 should be realized and paid from the estate through the receiver.

The correctness of this order has been impugned both in the appeal by Qudsia Begam and in that filed by Suraiya Qadr.

The suit as originally framed was one for administration under the provisions of O. 20, R. 13, Civil P. C., and a reference to the terms of that rule shows that the taking of an account is an

essentia. part of the proceedings in such a suit. And as already mentioned, the plaintiff definitely asked for an account to be taken. This being so the court-fee on the plaint was to be determincd with regard to the provisions of S. 7, Cl. 4 (f), Court-fees Act, and the fee was payable upon the value of the relief sought in the plaint. The plaintiff was unable to estimate the value at that stage and consequently the fee of Rs. 10 was sufficient under Art. 17, Cl. 6, Sch. 2 to the Act. S. 11 of the Act however shows that there is a further liability in cases where the value of the relief has been ascertained after trial, and this section which is made applicable to suits for account provides that if the amount decreed is in excess of the sum at which the plaintiff valued the relief sought, the decree shall not be executed until the plaintiff has paid the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the amount so decreed.

It cannot therefore be maintained that it was not competent to the Judge after having found in the initial stage of the case that the plaint was sufficiently stamped with a Rs. 10 court-fee to declare subsequently under S. 11 of the Act that there was a deficiency which was liable to be made good. Whether or not the amount of the deficiency so declared by the Judge is a correct amount it is impossible at the present stage to determine; for so far there has been no decision as to the precise amount which the plaintiff is to receive.

That amount will only become ascertainable when the directions contained in the preliminary decree have been carried out.

With regard to the moveable property consisting of Government promissory notes, jewels and other articles the Judge has directed that it is to be divided according to the proper shares, as far as possible by agreement of parties. All movable property regarding the division of which the parties fail to agree is to be sold under Court's orders and the sale proceeds are to be divided according to the shares. And as regards the immovable property the directions in the decree are for a partition on a basis of valuation defined in the decree.

It follows therefore that the amount of court-fee payable on the plaint will depend ultimately upon the value of the plaintiff's share and the amount in cash which is found to be payable to her and the correct amount of the deficiency will become ascertainable only when this amount has been finally determined.

For the rest, so far as the final decree operates to effect a partition of moveable or immovable property in specie it will be treated as an instrument of partition and will have to pay stamp duty in accordance with the provisions of Art. 45, Sch. 1, Stamp Act (2 of 1899). All we can do therefore at this stage is to direct that the question of court-fee be left open for the present and that it be decided in accordance with the above principles at the time when the final decree is being prepared.

The result is that we find that all these three appeals fail. We dismiss them accordingly and affirm the decree of the Court below subject to the modifications we have ordered to be made in the directions concerning the allotment of the habua and the disbursement of the money set aside to defray the costs of the obsequies of Sulaiman Qadr at Karbala, and subject also to the directions given above regarding the payment of court-fee.

As regards costs in the appeal of Qudsia Begum (No. 86 of 1912), we direct her to pay her own costs and those of the respondents. Similarly in Appeal No. 76 of 1912, the appellant Ruqaiya Begam will pay the respondent's costs in addition to her own.

In the case of Suraiya Qadr's appeal (No. 67 of 1912) the direction is that the parties bear their own costs.

B.V./R.K. *Appeals dismissed.*

A. I. R. 1914 Oudh 18

LINDSAY, J. C. AND KANHAIYA LAL, A. J. C.

Janki Kunwar and *others*—Defendants —Appellants.

v.

Narendra Bahadur Pal. Singh and *Dy. Commr, Fyzabad, as Manager of Dharwa Estate* — Plaintiff and Defendant—Respondents.

Second Appeal No. 307 of 1910, Decided on 29th July 1913, from order of Dist. Judge, Fyzabad, D/- 11th April 1910.

Bengal Alluvion and Diluvion Regulation (11 of 1825)—Riparian owners in Fyzabad district—Ikrarnamas about accepting custom of dhardhura if not entered in Record of Rights are not adequate proof of custom.

In the year 1866 at the time of the first regular settlement of Fyzabad District an inquiry with respect to the rule of alluvion and diluvion was made and it was found that the custom of dhardhura (deep stream boundary), by which the main channel of the Gogra was treated as the constant boundary between the villages abutting on the opposite sides of the river, prevailed generally in the locality. Rubkars or orders were issued that those landholders who accepted the custom should file ikrarnamas or declarations acknowledging the custom, while those who disputed it should give proof of the rule of alluvion and diluvion which they set up. The ikrarnamas were accordingly filed. They wound up with a declaration that the parties to them of their own free will and accord accepted the usage of dhardhura and that they and their successors-in-interest would in future act in accordance with it. But no entry relating to such custom was made in the Record of Rights prepared at the time.

Held : that the ikrarnamas or declarations were not adequate proof of the custom laid down therein : *I. A. Sup. Vol.* 34, *(P.C.)*, *Ref.* [P 22 C 2]

Gokaran Nath Misra—for Appellant.

Basdeo Lal and *Govt. Pleader*—for Respondents.

Judgment.—These three appeals have sprung out of three suits brought by Raja Narindar Bahadur Pal, the owner of an estate in the Basti District, against the proprietors of three villages, Maipur, Nasirabad and Prithuripur, situated in the District of Fyzabad. These villages abut on the Gogra river on the south side of it. On the north side and opposite these villages is the village of Mahwapur Khurd, the property of the plaintiff.

The purpose of the three suits was to recover possession of certain blocks of land which, according to the plaintiffs' allegations, had once been included within the boundary of Mahwapur Khurd and which had become detached from that village by sudden change in the course of the Gogra stream in the years 1308 and 1314 fasli. The areas in suit, it was claimed, had, as the result of these sudden changes, become attached to the lands of the three villages on the south side of the river, but the plaintiff relied upon the general rule which regulates the relations between riparian owners and which has been embodied in the Alluvion and Diluvion Regulation (Bengal Regulation 11 of 1825). His case was that his claims were governed by Cl. 2, S. 4 of the Regulation, a section which must be deemed to apply in the absence of any local usage such as is referred to in S. 2. According to the clause just mentioned in cases of avulsion where the river by a sudden change in its course detaches large pieces of land from one estate and joins them to the land of another estate, the owner of the land so detached retains his properoy in it provided that after such detachment the identity of land is not lost. The defendants in the three suits made a common defence, the pleas raised by them being as follows :

First, it was denied that the lands in suit had become suddenly detached as alleged by the plaintiff. It was pleaded that the junction of these lands to their villages had been effected by a process of gradual accretion extending over 20 years before suit, and that if the plaintiff ever was the owner of these lands his proprietary rights had been lost in accordance with the rule contained in Cl. 1, S. 4 of the Regulation.

The defendants next pleaded as an alternative defence that the dispute was governed by the provisions of S. 2 and not of S. 4, their allegation in this connexion being that the relations between themselves and the plaintiff were governed by a local usage by which the main channel of the Gogra was treated as the constant boundary between their respective estates. A plea of limitation based upon adverse possession extending beyond 12 years was also raised in bar of the suit.

Both the Courts below have found in favour of the plaintiff. It was held that the lands in suit had been suddenly detached from the plaintiff's village in the years 1308 and 1314 fasli, that the custom put forward by the defendants had not been proved, and that the suits were within time by reason of the finding that the lands had been detached in 1308 fasli and 1314 fasli, that is, less than 12 years before the suits were filed.

Several grounds of appeal have been taken here by the defendants, but the principal contest has been with respect to the question of custom: indeed this is practically the only matter in dispute here. In order to understand the nature of the case put forward on behalf of the appellants it is necessary to refer with some detail to certain proceedings which

took place in the year 1866 at the time when the first Regular Settlement of the Fyzabad District was being carried through. When the case was first put up for hearing we had before us only certified copies of portions of the record of these proceedings and we thought it advisable to adjourn the case and call for the full record, as also for certain other settlement records relating to the pargannas in which these Fyzabad villages are situated.

With these papers before us we have had the case re-argued at length by counsel.

The principal record with which we are concerned is entirely in the vernacular. It is styled the River Boundary File of the Fyzabad and Basti Districts of the year 1866, A. D., and is made up of rubkars or orders issued by the Settlement Officer together with certain reports made in compliance with those orders. The file also contains a large number of ikrarnamas or declarations executed by the then proprietors of villages on the banks of the Gogra river both in the Basti and Fyzabad Districts, or their agents.

We have to consider the circumstances in which these declarations came to be made and the legal effect which is to be given to them. The first paper on this record, then, is a rubkar issued by Mr. Carregy, the Settlement Officer of Fyzabad. From this we find that previous to 17th July 1866, the date on which the order was issued, Mr. Carnegy and the Collector of Basti had made a joint inquiry with respect to the rule of alluvion and diluvion affecting the villages in the Basti and Fyzabad Districts which were situated on the north and south banks of the Gogra. The record of this inquiry is not available to us. We can only gather from the language of the rubkar that they found that the custom of dhardhura (deepstream boundary) prevailed generally in this locality.

It further appears that the result of this joint investigation was submitted to the superior revenue authorities, the Board of Revenue of the (then) North-Western Provinces and the Financial Commissioner of Oudh. The rubkar goes on to intimate that the Board and the Financial Commissioner had accepted the finding of these two gentlemen, but had suggested the propriety of obtaining declarations from owners on both sides of the stream by way of acknowledgment that such a custom obtained and was binding upon them. Accordingly the Settlement Officer proceeded to set out in the rubkar how these declarations were to be procured. It was arranged that a subordinate Settlement Official of the Basti District should meet at an appointed place and should summon the proprietors or their agents to appear and make their statements.

It was intimated that if any of the proprietors declared against the dhardhura rule and set up any other custom he would be called upon to prove his assertion, for which purpose an opportunity would be afforded to him at a later stage.

Action was taken accordingly. The two officials who were appointed for the purpose carried out the intimations given to them and declarations were obtained from the owners of estates on both sides of the river with respect to 150 or 160 villages. It is not disputed that as regards Mohua Para a declaration was filed by the agent of the then owner who is now represented by the plaintiff, and it is admitted that similar declarations were put in relation to the three villages of the defendants with which we are concerned in these appeals.

These declarations were all made in a stereotyped form which, no doubt, had been framed by the subordinate revenne officials who had been appointed to obtain them. A reference was made in them to the joint inquiry previously held by the Settlement Officer and the Collector and to the fact that a report had been submitted to the Board of Revenue and the Financial Commissioner. It was recited that these superior authorities had accepted the finding of the Settlement Officer and the Collector as to the general prevalence of the custom of dhardhura (deepstream boundary), and that accordingly an order had been issued that those persons who accepted the custom should file declarations acknowledging it, while those who disputed the existence of such a usage should give proof of the rule of alluvion which they set up.

The ikrarnamas wound up with a declaration that the parties to them of their own free will and accord accepted the usage of dhardhura and that they

and their successors-in-interest would in future act in accordance with it.

It is the declaration made in this form on behalf of the then proprietor of Mohua Para that the defendants rely upon in proof of the custom set up, and the contention is that the plaintiff in the present suits is bound by that declaration. On behalf of the plaintiff-respondent the argument is that that declaration is not binding so as to estop the plaintiff from denying the existence of the custom. It is also argued that the language of the declaration does not amount to an admission that such a custom really existed. It is said that the declarations were obtained more or less by compulsion so as to support a conclusion which had already been reached by the Settlement Officer of Fyzabad and the Collector of Basti and which had been accepted by the superior revenue authorities. In short it is contended that the ikrarnamas do not constitute evidence of a custom already long established as immemorial usage, but merely of an undertaking on the part of the various proprietors to observe in future a rule which was being laid down for their guidance.

It can hardly, we think, be said that the declarations were not made voluntarily, for it is obvious enough that the owners of these riverine villages were at liberty to deny the existence of the dhardhura custom and to assert the existence of any other custom or rule of alluvion if any such custom or rule did apply. But we think there is something to be said in favour of the argument that the language of these declarations does not clearly import an admission that the rule of the deepstream boundary had been sanctioned by immemorial usage. It is not denied that during the course of the settlement a record of customs was prepared as was done in other districts. The usual course was to embody this record of customs in the Wajibularz of each village, but in certain portions of Fyzabad District another practice was followed by which entries relating to custom were collected in a separate volume prepared for each parganna. This volume was called the Fard Riwajiam and it is a curious fact that no entry relating to this custom of dhardhura is to be found in the volumes relating to the pargannas in which the Fyzabad villages in suit are situated. No doubt the custom of this nature could not prevail universally throughout the parganna, for it could only affect such of the villages as are situated on the banks of the Gogra. At the same time the number of these villages was considerable. For example, in the Amsin parganna ikrarnamas had been drawn up in respect of 21 villages, in Tanda parganna for 20 villages, and in the Barhar parganna for no less than 35 villages.

In these circumstances we might have expected to find in the record of customs of these pargannas some mention of a custom of alluvion which affected so many villages and we are not altogether satisfied with the reply to this argument which has been given by the appellants' learned counsel that the file which we have now before us was intended to be the sole record of the custom relating to alluvion and diluvion. The practice was certainly to record such customs in the Wajibularaiz of villages subject to fluvial action and where the "Fard Riwaj" took the place of the Wajibularaiz, we should naturally expect to find there a record of such a custom. We have now to consider a judgment of this Court in *Mir Bakar Husain* v. *Gulam Bhawani Pal* (1) which was decided in the year 1875. In that case the Judicial Commissioner had to interpret one of the ikrarnamas which were obtained in the circumstances just referred to. It is clear that the learned Judicial Commissioner in that case had before him some evidence which is not available here, that is, evidence relating to the proceedings taken in the joint inquiry held by the Settlement Officer of Fyzabad and the Collector of Basti. However he had before him one of the ikrarnamas (which he calls "agreements") and came to the conclusion that the statements or admissions contained in it were no adequate proof of the custom alleged. This opinnion was based in part upon a judgment of their Lordships of the Privy Council reported as *Baboo Bissessur Nath* v. *Maharaja Mohessur Bux Sing* (2), a case in which an agreement had been taken from the owners of two estates on opposite sides of the Ganges. The agreement was set up in proof of a custom but their Lordships refused to accept it

(1) Select Cases (Oudh) 27.
(2) [1873] 11 B. L. R. 265=18 W. R. 160=I. A. Sup. Vol. 34 (P. C.).

as sufficient evidence of a distinct custom. It appears from the judgment that prior to the taking of the agreement (ikrarnama) there had been a violent quarrel between these proprietors and that the Government had interposed and induced them to come to terms the arrangement being ratified by the execution of the ikrarnama.

The facts of that case and of the case before the Judicial Commissioner. Mr. Currie, were not altogether analogous, inasmuch as there was nothing to show that in 1866 when these ikrarnamas were taken there were any disputes between the landowners of the Basti and Fyzabad Districts. But Mr. Currie was of opinion that these proceedings of 1866 might be construed as measures taken by Government officers with a view to preventing such disputes in future and there is, we think a good deal to be said in favour of this view. The vagaries of some of the rivers in Oudh, and of the Gogra (or Sarju) in particular, have led to much litigation in many instances in which thousands of rupees have been spent over a few acres of barren sand. The rule of the deep-stream boundary (dhardura) has the merit of convenience and simplicity and much of the futile litigation would have been avoided had it been possible to apply this rule. It is by no means improbable that a sense of the convenience of the rule led to the proceedings of 1866 and that, as Mr. Currie suggests, the taking of these ikrarnamns was an attempt on the part of the revenue authorities to induce these proprietors to accept for their future guidance a rule which would settle any disputes which might arise thereafter.

We may notice here that the defendants have not been able to cite instances in which the custom set up by them has been followed and we can scarcely believe that the reason for this is, as was suggested by the appellants' learned counsel, that no similar case had ever happened at any rate as between the parties to these suits. The river Gogra must have changed its course pretty frequently between 1866 and the present time. And bearing in mind that the custom alleged is in the nature of a local usage, and not one confined to the villages in dispute in these suits, we must take notice of the fact that in *Mir Bakar Husain* v. *Gulam Bhawani Pal* (1) where the custom was set up it was found not to be established. There can be no doubt that the villages with which that particular case was concerned are in the same locality as those in which the villages with which we are now dealing are situated.

Taking into consideration all the circumstances to which references have been made we think the correct conclusion is that these declarations or ikrarnamas are not adequate proof of the custom which the defendants set up, and further we think it by no means unlikely that the interpretation put on the language of these ikrarnamas by this Court so far back as the year 1875 has been acted upon ever since by parties who are interested in these villages along either side of the Gogra river and that in consequence we ought to apply the rule of stare decisis so as to prevent any disturbance of titles.

This finding disposes of the appeals. The only other point which was discussed before us at the hearing was with respect to the findings of the Courts below that the areas in suit were capable of identification. It was suggested that the findings were wrong, but we are not satisfied that there is any ground of law upon which we could interfere. Having come to the conclusion of fact that the river changed its course suddenly in the years 1308 fasli and 1314 fasli and that large areas had in consequence been detached en bloc from the plaintiff's village it was open to the lower Courts to infer as a fact that these areas did not lose their identity. On the findings of the Courts below the claim is within time. The plaintiff-respondent has amended the plaint to bring it into conformity with the area found by the amin, and should be required to pay any additional court-fee which may be due from him in respect of the extra areas awarded before execution of the several decrees is allowed to be taken out. Subject to the above condition the appeals are dismissed with costs.

B.V./R.K. *Appeals dismissed.*

A. I. R. 1914 Oudh 23

KANHAIYA LAL, A. J. C.

Gaya Din Singh and *another*—Defendants—Appellants.

v.

Har Karan Singh—Plaintiff—Respondent.

Second Appeals Nos. 54 and 55 of 1912, Decided on 29th July 1913, from decree of Dist. Judge, Fyzabad, D/- 18th November 1911.

(a) Transfer of Property Act, S. 61—Undertaking by mortgagor to pay money advanced on later security with money due on earlier security — Such an undertaking does not preclude separate redemption.

A mere undertaking by a mortgagor to pay the money advanced on a later security along with the money due on an earlier security between the same parties is merely an indication of the time fixed for the payment of the same and does not amount to a consolidation of the debts so as to preclude the redemption of one without redeeming the other. [P 23 C 2 ; P 24 C 1]

(b) Mortgage—Collateral transaction between mortgagor and mortgagee on date of mortgage must be scrutinized carefully.

Any collateral transaction entered into between the mortgagor and the mortgagee on the same date on which the principal mortgage-deed is executed must be scrutinized with very great care. [P 24 C 2]

(c) Civil P. C., S. 34 — Unconscionable charge of interest amounting to clog—Courts can allow lower rate—Interest.

Where it was found that the rate of interest entered in a deed of further charge was hard and unconscionable and that the creditor imposed his own terms and put pressure on the executants in order to impose a clog on redemption :

Held : that, in such a case, it was discretionary with the Court to allow a lower rate of interest on the deed of further charge. [P 25 C 1]

Gokaran Nath Misra—for Appellants.

J. K. Bannerji—for Respondent.

Judgment.—These appeals arise out of separate suits brought by the plaintiff-respondent for the redemption of two usufructuary mortgages, one of which was executed by Bholai Singh and Ramnath Singh in favour of Gayadin Singh on 28th June 1879, and the other by Bholai Singh and Mt. Ram Kali in favour of the same mortgagee on 27th June 1883. The defendants pleaded that the plaintiff was not entitled to redeem the mortgaged property without the payment of the amount due on two deeds of further charge executed by Bholai Singh and Mt. Ram Kali in favour of Gayadin Singh, their predecessor-in-title.

The first deed of further charge was executed on 27th June 1883, in lieu of Rs. 200 and provided for the repayment of the mortgage money with interest at Rs. 25 per cent per annum. It was therein agreed that the mortgagors shall not be entitled to redeem the usufructuary mortgages abovementioned till the amount due on the deed of further charge was paid. The other deed of further charge was executed by the same persons in favour of Gayadin Singh in lieu of Rs. 172, on 19th October 1883, and provided for the repayment of the money with interest at Rs. 12-8-0 per cent per annum along with the mortgage moneys secured by the usufructuary mortgage deeds abovementioned.

The Courts below held that the rate of interest entered into the deed of further charge, dated 27th June 1883, was hard and unconscionable and was intended to operate as a clog on the equity of redemption. They reduced the rate of interest payable under that deed, accordingly, to Rs. 6 per cent per annum. In regard to the other deed of further charge, dated 19th October 1886, the Court of first instance allowed the amount due on the same, but the lower appellate Court held that it did not create a lien and declared the amount due under it to be recoverable by the defendants from the plaintiff personally.

It is clear from the terms of the second deed of further charge, dated 19th October 1886, that, while it provided that the amount due on the said deed shall be paid along with the mortgage moneys secured by the usufructuary mortgage deeds, dated 28th June 1879, and 27th June 1883, and that till the payment of the amount secured by the deed of further charge, the mortgaged property shall not be sold or mortgaged elsewhere, there was no covenant postponing the redemption of the usufructuary mortgage-deeds above referred to till the amount due on the said deed was first paid. In other words, there was no covenant to consolidate the usufructuary mortgage deeds with that deed of further charge so as to render the redemption of the former impossible without the redemption of the latter, and the plaintiff-respondent is therefore entitled to redeem the usufructuary mortgages in question leaving the defendants-appellants to seek their remedy under the deed of further charge in the manner provided by law. A mere undertaking by the mortgagor to pay the money advanced on the

later security along with the money due on the earlier security is merely an indication of the time fixed for the payment of the same and does not amount to a consolidation of the debts so as to preclude the redemption of one without the redemption of the other.

All covenants operating as a fetter on the equity of redemption have to be strictly construed, and, unless the intention is clearly and unequivocally expressed, no restraint on the power of redemption of the kind referred to can be recognized. In *Bhartu* v. *Dalip* (1), where a bond provided for the payment of the amount due along with the mortgage money secured by a usufructuary mortgage-deed, Stanley, C. J. and Knox, J., held, that the condition in the latter bond did not evidence an intention to consolidate the amount thereof with that of the earlier one and that the plaintiff was not precluded from redeeming the usufructuary mortgage alone. The defendants-appellants in the present case are not therefore entitled to claim the amount due under the said deed from the plaintiff-respondent as a condition precedent to the redemption of the usufructuary mortgages in suit.

The Court below did not state the grounds on which a personal liability was imposed upon the plaintiff-respondent for the amount due on the said deed. He was a legatee from Bholai Singh under a deed of gift, dated 24th February 1908, but if a personal liability was sought to be imposed on him under S. 128, T. P. Act, it was necessary to find that he was a universal donee or a donee of the entire property of the donor. A personal liability cannot moreover be enforced by the defendants except by means of a separate suit, and the Court below was therefore not justified in directing the payment of the said amount by the plaintiff-respondent personally in this suit.

In regard to the other deed of further charge, dated 27th June 1883, the Courts below rightly regarded the transaction as an attempt to clog the equity of redemption. The deed of further charge and the usufructuary mortgage of 27th June 1883, were executed on one and the same date. Considering the delicate position generally occupied by an impecunious landowner mortgaging his property with possession in favour of another, any collateral transaction entered into between the mortgagor and the mortgagee on the same date must be scrutinized with very great care. "And there is great reason and justice in this rule," said Lord Nethington, L. C., in *Veernon* v. *Bethell* (2), "for necessitous men are not, truly speaking, free men, but to answer a present exigency will submit to any terms that the crafty may impose upon them." In *Samuel* v. *Jarrah Timber and Wood Paving Corporation Ltd.* (3), where a limited company borrowed money upon the security of their debenture stock subject to the lender having an option to purchase the stock at 40 per cent within 12 months ; the loan to become due and payable with interest at 30 days' notice on either side, and the lender claimed to purchase the stock at the agreed price within the 12 months and before the company gave notice of their intention to repay the loan, it was held that the option was void, and that the company was entitled to redeem the loan on payment of the principal, interest and costs. Lord Macnaghten, in explaining the rule which prevented a mortgagee at the time of the loan to enter into a contract for the purchase of the mortgaged property observed :

"It seems to have had its origin in the desire of the Court of Chancery to protect embarrassed landowners from imposition and oppression. And it was invented in order to obviate the necessity of inquiry and investigation in cases where suspicion may be probable and proof difficult." The taint does not necessarily attach to independent transactions entered into on the same date, but a deed of further charge executed alongside a deed of usufructuary mortgage and expressly restricting the right to redeem the latter till the payment of the amount due on the former, by which a higher rate of interest was secured, is a fetter on the equity of redemption from which, if the terms are unconscionable, the Courts of equity would grant relief. A mortgage is not an exception to the general rule that parties must be held bound by their contracts, but where a mortgage and a deed of further charge are executed on the same date and appear to form part of the same transac-

(1) [1906] 3 A.L.J. 672.

(2) [1761] 2 Edn. 113.

(3) [1904] A.C. 323.

tion, a mortgagor may claim to be relieved from an oppressive bargain on the same conditions as any other debtor. The bargain should not be such as to take away with the one hand the right of redemption given by the other. In *Kanhaya Lal* v. *Narhar* (4), it was held that it was open to a mortgagor and mortgagee to enter into a contract subsequently to the mortgage for the sale of the mortgaged property under the mortgage; but it must not be a part and parcel of the original loan or mortgage bargain.

The Court below found that the rate of interest entered into the deed of further charge was hard and unconscionable and that the creditor imposed his own terms and put pressure on the executants in order to impose a clog on redemption. I see no reason therefore to disturb the discretion exercised by the Court below in allowing a lower rate of interest on the deed of further charge. The appeals therefore fail and are dismissed with costs. The cross-objection is allowed and the order of the Court below, directing the plaintiff-respondent to pay the amount due on the subsequent deed, dated 19th October 1886, personally, is discharged. The plaintiff-respondent will get his costs from the defendants-appellants in all the Courts.

B.V./R.K. *Appeals dismissed.*

(4) [1903] 27 Bom. 297.

A. I. R. 1914 Oudh 25

LINDSAY, J. C.

Bandi Din and *others*—Defendants—Appellants.

v.

Dharammangal Singh and *others*—Plaintiffs—Respondents.

First Appeal No. 44 of 1913, Decided on 18th July 1913, from order of Addl. Judge, Hardoi, D/- 7th February 1913.

(a) Wajibularz — Exclusion from inheritance may be by implication.

Although there is no express exclusion from inheritance in the language of a Wajibularz, there may be exclusion by necessary implication: 2 *I. C.* 253, *Foll.* [P 27 C 2]

(b) Custom — Succession — Exclusion of daughters amongst Thakurs of Oudh is common.

In Thakur families in Oudh the custom of excluding daughters and their sons from inheritance is notoriously common. [P 28 C 1]

(c) Custom—Family — Oral evidence of witnesses not belonging to family has no weight.

General statements of opinions as regards a particular family custom and as found in the oral evidence of witnesses not belonging to the family, in which the custom derogating from the ordinary Hindu law of inheritance is alleged to exist are not of much weight as evidence. [P 28 C 1]

(d) Civil P. C. (1908) S. 11—Custom not established in previous suit because of negligence in production of evidence—Question of custom is not res judicata in subsequent suit.

When in a previous suit a family custom set out by the plaintiff could not be established owing to his neglect in producing evidence and it was therefore decided that the custom did not exist, it cannot be argued in a subsequent case in which the question of the same custom of the same family arises, that the custom does not exist. [P 29 C 1]

(e) Hindu Law — Widow—Widow after husband's death getting possession of proportionate share of family property—No allegation of permissive possession—Inference is that she succeeded to her husband's divided share.

Where a Hindu widow after her husband's death and in the lifetime of his brothers got possession of his proportionate share of the family property, and it was not alleged that the possession was permissive the natural inference is that she succeeds to the divided share of her husband as an ordinary Hindu widow. [P 29 C 2]

Nabi Ullah—for Appellants.

Gokaran Nath Misra and *Lakshmi Narain*—for Respondents.

Judgment.—The property which constitutes the subject-matter of the suit out of which this appeal has arisen, is a two annas zamindari share in mauza Simau, a village in the Unao District. The last male owner of the property was Raghunath Singh, who died so far back as the year 1878.

It is admitted that after his death his widow, Mt. Hansi, got possession of the share and remained in possession till the year 1904, when she died; but the nature of Mt. Hansi's interest in the property is one of the matters in dispute. The plaintiffs alleged that she had merely the estate of an ordinary Hindu widow, while the defendants alleged that she was the absolute owner by adverse possession and also by virtue of a custom. On 13th December 1882, Mt. Hansi mortgaged this two annas share to her own son-in-law, Ganga Din, to secure a sum of Rs. 1,000. This mortgage was with possession, the period of which was to be for 31 years. Out of the mortgage money, a sum of Rs. 700 was left with the mortgagee to pay off a previous mortgage executed by Mt. Hansi in favour of one Mt. Bitto on 18th January 1882.

This Mt. Bitto was the widow of one Puran Sah. She is dead now and is represented by the appellants here, who were defendants 2 to 8 in the Court below.

In February 1889, Mt. Hansi executed a deed of further charge on the same share in favour of Ganga Din, who then by a deed executed on 15th February 1889 submortgaged his interest in this property to one Sheoraj Singh. This man was defendant 1 in the Court below and is a daughter's son of Mt. Hansi. His mother wasmarried to a man named Jangli Singh.

In 1893 Sheoraj Singh mortgaged his interest to Mt. Bitto and after that lady's death a suit was brought on this mortgage by her representatives, the present appellants. A decree was obtained in execution of which the mortgagee rights of Sheoraj Singh were sold and purchased by the decree-holders themselves. The sum was not sufficient to liquidate the mortgage-debt and in June 1911 the decree-holders got a further decree for the balance under the provisions of O. 34, R. 6, Civil P. C.

Application was then made to execute this decree by sale of the equity of redemption of the two annas share which, it was alleged, had become vested in Sheoraj Singh both by inheritance as a daughter's son of the last male owner and under a will executed in his favour by Mt. Hansi.

The present suit was instituted on 21st May 1912 by Dharammangal Singh who is the minor son of Sheoraj Singh, whose name has just been mentioned. The suit was for recovery of possession of the two annas share and there was also a claim for injunction to restrain execution proceedings against the equity of redemption. The plaintiff's case was that Mt. Hansi having had only the estate of a Hindu widow, her interest in the property came to an end in 1904, when she died, and that the estate thereupon devolved upon certain reversioners of her husband. On 8th January 1912, these reversioners executed a deed of gift in plaintiff's favour by which they transferred all their rights in the property to him, with the exception of a few bighas of land and a right to receive Rs. 10 per annum on account of dues. These reversioners were made pro forma defendants in the first instance but were afterwards added as plaintiffs 2 to 7.

The real defendants in the case were defendants 2 to 8 who are now the appellants, and who, as already said, are the legal representatives of Mt. Bitto. Their interest, of course, was to show that Sheoraj had an absolute title to the property and various pleas were raised for this purpose.

First of all, it was denied that the persons who had transferred to plaintiff 1, were, in any way related to Mt. Hansi's husband and had any interest in the property which they could convey.

On this point, the lower Court found in favour of the plaintiffs and the finding has been accepted. It is no longer disputed that these persons were related to Raghunath as they allege and that as the time the succession opened after the death of Mt. Hansi, they were the nearest heirs who would succeed provided (as alleged by the plaintiffs) that Raghunath was separate in estate and that the daughter's son does not inherit.

The next plea raised in defence was that Hansi had an absolute estate. It was pleaded that her husband Raghunath was at the time of his death living in union with his two brothers. Achal and Bandi, and that when Raghunath died his widow took possession of a two-annas share adversely to the two brothers who were entitled to it by survivorship. This possession having extended over 12 years, it was pleaded that a full title had been acquired by prescription. Consequently it followed that all her dealings with the property in suit were done in the capacity of a full owner. It was alleged that the will, which she executed in favour of Sheoraj vested the equity of redemption in him and it was further claimed that apart from the will Sheoraj had a good title as heir being the daughter's son of Raghnuath. The plaintiffs replied by setting up a custom by which daughters and daughter's sons are excluded. Lastly, it may be noted that the contesting defendants raised the plea of legal necessity in support of Hansi's alienations.

The result of the case in the Court below was that the claim was decreed subject to payment by the plaintiffs of a sum of Rs. 267. The Judge held that this amount constituted a charge on theshare being a portion of a debt due by Hansi's

husband to secure which Mt. Hansi had executed, after her husband's death, a mortgage of the two annas share in favour of Bitto. The first question which has to be settled in this appeal is that of the custom set up by the plaintiffs according to which daughters and their sons are excluded from inheritance in the family to which Raghunath Singh belonged. The Court below held that the custom was proved: and the appellants challenge the finding. Eight witnesses were produced to depose to the existence of the custom. The plaintiffs also relied upon the provisions of the wajibularz of the village prepared at the time of the regular settlement. A copy of the clause of the wajibularz relating to inheritance is on the record (Ex. 4) and it appears incidentally, that this document was attested at the time of settlement by seven cosharers and lambardars one of whom was Raghunath Singh himself. We have therefore to interpret the language of the clause relating to inheritance. It cannot be denied that the document is itself strong proof of the custom it purports to describe. After declaring the usual rule namely, that the sons of a deceased owner inherit in equal shares, the clause proceeds to set out the rule which is to be applied in the case where there are children by the different wives, and it is laid down that where none of the wives have issue (aulad), they are to be owners of the property in equal shares with powers of sale and mortgage during their lives (ta hin hayat). It is then provided that after their deaths, the property is to go to the near relations of the husband (qaribi shauhari). Next we find the ordinary rule of Hindu law referred to, namely, that where two brothers are living in union and one of them dies, the estate passes to the survivor with an obligation to provide maintenance for his brother's widow and then we come to the case where the two brothers are separate in interest, the case which, according to the plaintiffs, has arisen here.

The rule is laid down that if one of such brothers dies, his wife is to retain possession with power to sell and mortgage for her lifetime and that on her decease, the estate is to pass to the brother (bhai) of the deceased husband.

Now it is true, as contended by the learned counsel for the appellants, that there is nothing in the language of this wajibularz which expressly excludes from inheritance the daughter or the daughter's son, but it cannot be argued now in this Court that this fact is sufficient to demonstrate that there is no custom which in this particular respect derogates from the ordinary Hindu law of inheritance.

It has been laid down repeatedly in decisions of this Court that although there may be no express exclusion, there may be exclusion by necessary implication. There is no need to cite a string of authorities for this proposition: it is sufficient to refer to the case reported as *Sheomangal Singh* v. *Jagpal Singh* (1), and the various rulings which are mentioned in that judgment. The Court below, following the rule of interpretation, which has been sanctioned by the authority of this Court, has held that in the present instance the daughters aud their sons are impliedly excluded, and I am satisfied that this is the correct construction of the wajibularz before me. The provision for the immediate succession of the hasband's collateral relations upon the death of the childless widow, or upon the death of the last surviving childless widow where there are more than one, is inconsistent with the notion that a daughter or her son is to take by inheritance. It has been urged that in this connexion the term "aulad" in the expression "*jo kisi aurat ki aulad na ho*" must mean "issue generally, that is, male or female" but, reading the phrase with the language which precedes, I think it must be taken that "aulad" here means the same as "larke" the word used in the previous clause, that is to say, male children.

And similarly the provision in the case of separated brothers that the surviving brother is to take immediately after the death of the widow negatives the idea of any succession by the daughter and her son.

There is no doubt room for argument as to the interpretation of isolated passages in the document. The use of varying expressions such as "larke" and "aulad" is calculated to create confusion: but it is common experience that these declarations as to the custom were often loosely recorded and the only safe rule is to read the document as a

(1) [1909] 12 O. C. 63=2 I. C. 253.

whole and to deduce its meaning accordingly. An in doing so we are I think entitled to take notice of the fact that in Thakur families in Oudh the custom of excluding daughters and their sons is notoriously common.

I come therefore to the conclusion that on the .terms of the wajibularz in this case, daughters and daughters' sons do not inherit.

With regard to the oral evidence of the custom, there are the statements of eight witnesses not all of whom however belong to the family though they do belong to the same class of Thakurs. General statements of opinions in matters of this kind are not perhaps of much weight as evidence and in the present case particularly ought not to be treated too seriously. As was pointed out by the appellants' learned counsel, his clients are Banias, the other parties are Thakurs and there was not much chance of obtaining any rebutting evidence to set against the declarations of the Thakur witnesses. The defendant Sheoraj is the father of the plaintiff and there can I think be little doubt that the suit was brought in order to prevent, if possible, the passing away of the property into the hands of the Bania family which had been financing Raghunath and his widow and her son-in-law for years. But it is important to notice that one of the witnesses, Bikram Singh, himself one of the plaintiffs, was able to refer to three specific instances in the family in which daughters were excluded. One of these instances was within his own immediate knowledge. His father, Gajja, had a brother Jawahir, who died some six or seven years ago. At his death Jawahir had two daughters alive and they were excluded by Gajja who took the property. The lower Court discredited this evidence merely because another witness Din Dayal (P. W, 3) stated that Jawahir had three daughters. Din Dayal is not one of the family to which Bikram Singh belongs, although he is of the same clan.

But apart from this, the two statements are not necessarily contradictory for what Bikram Singh says is that Jawahir had two daughters alive at the time of his death. He may have had a third daughter who predeceased him.

Again it may be pointed out with reference to the second instance cited by the witness that his statement, if untrue could have been contradicted. He spoke of a case in which one Debi having died his estate was taken by his brother Koeli to the exclusion of Debi's daughter, Mt. Jhauri, who is still alive. This woman was not called as a witness but if she did succeed to her father's property, the fact could easily have been established by the appellants.

I think the evidence of Bikram Singh is strong proof of the existence of the custom set up and I am of opinion that his testimony is quite reliable. There remains to be noticed one point which was sought to be made by the defendants-appellants. They claimed that in a suit decided in the year 1903, in which the right of succession to the property of one Suba Singh, a member of the family, was in dispute. the existence of the custom now set up by the plaintiffs was negatived.

The facts relating to this litigation were as follows : Suba Singh was succeeded after his death by his widow who died in the year 1900. One Gaya Prasad, who set himself up as a son of Suba Singh, took possession of the property and a suit was brought against him by one Dalganjan Singh who claimed to be the nearest collateral heir of Suba Singh.

Suba Singh had left a daughter, Mt. Lalti, and she applied to be made a defendant in the case. She denied the right of the plaintiff to succeed. The plaintiff resorted by saying she was illegitimate and he also put forward the custom by which he alleged daughters were excluded from inheritance. The case came on for trial. The plaintiff had neglected to call his evidence, the Subordinate Judge refused to give an adjournment and the result was that it was decided that the custom set up by Dalganjam had not been proved. The Subordinate Judge dismissed the suit. He found that Gaya Prasad was of illegitimate birth, and that he was not a son of Suba Singh at all as he had been born several years after Suba Singh's death. He also found that Lalti was the legitimate daughter of Suba Singh and that she had the right to inherit as no custom to the contrary was proved.

After this Mt. Lalti brought a suit against Gaya Prasad to recover possession of the property, and as may be inferred from the facts just stated she had

no difficulty in winning her case and recovering her father's property.

I am unable to see that the results of this litigation are of any assistance to the appellants as proof of their assertion that the ordinary Hindu law of inheritance obtains in the family. The plaintiff who set up the custom neglected to produce evidence and the issue was decided against him; that is all. It cannot be argued from these facts that the custom of exclusion of the daughters does not exist

I have now dealt with all the evidence relating to the issue of custom and my finding is that the decision of the lower Court is correct: the custom is established.

The next point to be decided is whether Raghunath Singh, the husband of Mt. Hansi, was, at the time of his death in 1878, living as a member of a joint family with his brothers, Achal and Bandi, or whether, as the plaintiffs allege, he was separate from his brothers. The Court below came to the conclusion that he was separate. The appellant's case is that separation was not proved.

The burden of proof lay upon the plaintiffs and we have now to consider the evidence direct and circumstantial which has any bearing upon the question.

With regard to the oral evidence some of the plaintiffs' witnesses deposed that Raghunath was separate, but this testimony does not appear to me to be of much value. The most important statement in this connexion was made by Biseshar (P. W. 9), who stated that his cousin was married to Raghunath's daughter. This witness deposed that Raghunath was separate from his brothers, and he (witness) was fifty-one years of age at the time he gave his evidence and must therefore have been about seventeen in 1878, when Raghunath died. It is possible that he is speaking the truth: at any rate, it must be admitted that he had the opportunity of acquiring some personal knowledge regarding the state of the family.

I may note here that the defendants-appellants produced no oral evidence in rebuttal.

However, there is a good deal of circumstantial evidence and it was on this principally that the Judge of the Court below relied for his conclusion.

It is proved that in the year 1868, Raghunath mortgaged a six-anna share of Simau to Puran Sah, the husband of Mt. Bitto, and it is also proved that in 1872 Raghunath joined with his brother Bandi in executing a deed of further charge on the same property in favour of Puran. Both these mortgages were with possession and it is a fair inference therefore that up till the year 1872, the brothers were joint. We have nothing to show what happened between that year and the year 1878, when Raghunath died.

One fact is certain, namely, that Mt. Hansi after her husband's death obtained possession of a two annas share and the question is how she came into possession. The most obvious explanation is that she got possession because it was recognized that the two annas share was the separate property of her husband, but the appellants insist that this was not the case. They wish to make out that Hansi took adverse possession of the share against the will of Reghunath's brothers and succeeded in retaining possession till she acquired an absolute title. In speaking of possession here what is meant is legal as opposed to physical possession, for the property was in the occupation of the mortgagee or his successors. Now, this version, which the appellants put forward, is on the face of it most improbable. It would be a very unusal thing for two brothers entitled by survivorship to the property of a deceased brother to allow his widow possession of that property except by way of consolation, that is, with the object of providing her maintenance. It is scarely credible that the widow could forcibly retain possession against the will of her husband's brothers.

It is not the case of either party that Hansi got into possession by way of maintenance; indeed such an admission on the part of the appellants would have thrown away their case. Nothing but a case of adverse possession would fit the defence which they raised. Looking to the bare fact that Hansi got possession of a two annas share after her husband's death, and bearing in mind that there is no allegation that the possession was permissive, the natural inference is that she succeeded for her lifetime to the divided share of her husband under the ordinary rule of Hindu law.

And the subsequent dealings of Mt. Hansi with respect to this two annas

share confirm the conclusion that the property was separate. I do not see how the appellants are in a position to avoid this conclusion for it is proved that Mt. Bitto, whom they now represent, dealt with Mt. Hansi independently in respect of this two annas share.

It is proved that after the death of Raghunath, Mt. Bitto sued on the mortgages executed in her husband's favour in the years 1868 and 1872. Mt. Hansi must have been a party to these proceedings and in January 1882, we find Bitto making a new arrangement about the mortgages. On 18th January 1882, she accepted from Mt. Hansi a simple mortgage of a two annas share already mortgaged to her. The agreement was that Bitto was to surrender possession from Asarh 1289 Fasli, i. e., about June or July 1882. The period of the mortgage was 12 years, and the mortgage money was Rs. 700, one item of this being expressed to be Rs. 267 due on account of Raghunath's share of the mortgage debt due under the two possessory deeds of 1868 and 1872.

At about the same time, Achal Singh, the brother of Ragunath, mortgaged a four annas share out of the six annas share to Jangli Singh (a son-in-law of Mt. Hansi) and Mt. Bitto then accepted a mortgage from Jangli Singh of his interest in this four annas share to secure a sum of Rs. 1,334, which would represent the balance of the debts due on the usufructuary mortgages. The terms of this mortgage executed by Jangli were similar in all respects to those of the mortgage executed by Hansi and part of the bargain was that Bitto should surrender possession to Jangli. These facts were admitted in the written statement filed by two of the appellants (defendants 7 and 8). In para. 21 of this written statement, the transactions were explained by saying that Mt. Hansi separated from her husband's brothers in the beginning of 1882. This is an absurd allegation for there could not possibly be any state of jointness between a Hindu widow and her husband's brothers. And again it may be pointed out that by the year 1882, Mt. Hansi's adverse possession upon which the appellants rely had lasted only four years and could not have conferred any title upon her. It is clearly admitted in this same para. 21 of the written statement that the mortgage debt due to Bitto was apportioned with her consent between Hansi and her husband's brother, Achal, who was at that time represented *qua* a four annas share in the property by his mortgagee, Jangli Singh. This admission is, to my mind, a very strong piece of evidence and the transactions themselves seem to indicate clearly that the shares were recognized as divided and this because there must have been a division before Raghunath died in 1878.

It is not necessary, I think, to refer to the details of other transactions affecting this two annas share, except to Ex. A-5, which is a copy of a mortgage deed executed on 13th December 1882, by Mt. Hansi in favour of her son-in-law, Ganga Din. This was a possessory mortgage of the two annas share and Rs. 700 were left with the mortgagee to pay off the mortgage executed in Bitto's favour in the previous January. It is a significant fact that this mortgage was attested by Achal Singh himself. He must have been well aware of the nature of the transaction and the fact that he bore witness to the execution of the mortgage is strong proof that he treated the two annas share as the separate property of his deceased brother Raghunath, which Hansi had a right to keep in her possession for her lifetime. Having regard to all this evidence, I am of opinion that the finding that Raghunath at the time of his death was separate from his brother is correct. This being so, the defence of adverse possession on the part of Hansi falls to the ground. I may add that there is nothing in the language of the wajibularz to lend the colour to the suggestion put forward that Mt. Hansi, though a widow, had by custom an absolute right of disposal over her husband's share. The only other point to be determined is in connexion with the plea of legal necessity. It has already been stated that the Court below found that a sum of Rs. 267 was charged on the property on account of legal necessity, i. e., the necessity imposed upon Hansi to discharge her husband's share of the mortgage debts due under the deeds of 1868 and 1872.

It is not seriously contended that the appellants are entitled to receive from the plaintiffs any larger sum than this on account of principal, but it is urged and I think with reason that interest on

this sum should have been awarded at the contract rate provided in the mortgage of 18th January 1882. It seems clear that Bitto gave up possession in that year and by the terms of the deed, she was to get 13 annas per cent per mensem with effect from the beginning of the month of Asarh 1289 Fasli. This being so, Bitto's representatives are entitled to get interest at the above rate on Rs. 267 from that date and the decree of the lower Court is modified accordingly. The plaintiffs will be required to pay the money within thirty days from the date of this Court's decree. With this modification in the order of the Court below, the appeal is dismissed. The parties will pay costs here in proportion to their success and failure.

B.V./R.K. *Appeal partly allowed.*

A. I. R. 1914 Oudh 31

LINDSAY, J. C.

Inayat Ullah and *others*—Applicants.

v.

Amanat Husain and *another*—Respondents.

Criminal Appln. No. 56 of 1914, Decided on 16th April 1914, from order of Joint Magistrate, Fyzabad, D/- 31st January 1914.

(a) Criminal P. C. (5 of 1898), S. 145—Question of possession and not of title has to be inquired into.

The question of title does not arise in proceedings taken under S. 145, Criminal P. C. There the Magistrate has simply to determine with which of the parties possession lies at the time. [P 31 C 2]

(b) Criminal P. C. (5 of 1898), S. 146—Attachment of property cannot be ordered before inquiry under S. 145 is completed.

Under S. 146, Criminal P. C., a Magistrate has got no jurisdiction to issue any order for attachment of property unless and until he has made the inquiry contemplated by S. 145, Criminal P. C., that is to say, unless he has received and considered the evidence produced before him by the parties. [P 31 C 2]

Muhammad Wasim—for Applicants.

P. N. Rozdon—for Respondents.

Judgment.—This is an application for revision of an order passed by a Joint Magistrate of Fyzabad exercising first class powers. The order purports to be one under S. 146, Criminal P. C. I am of opinion that this order has been made without jnrisdiction and must be set aside. There was a dispute between two parties as to the right to collect rent of a certain four annas share in a village. Proceedings were taken under S. 145 and under sub-S. 4 of that section it was the bounden duty of the Magistrate to receive such evidence as the parties chose to produce before him. In the present instance no such evidence has been recorded by the Magistrate. He states in his order that Sadiq Husain, who was the petitioner, was desirous of giving evidence as to possession. The Magistrate says that his giving evidence would serve no useful purpose as he is plainly not entitled to collect the rents of Mt. Kayuman's share. The title of Sadiq Husain to collect rent of Mt. Kayuman's share was not a matter with which the Magistrate was concerned in these proceedings. The question of title does not arise in proceedings taken under S. 145. All that the Magistrate has to do is to determine with which of the parties possession lies at the time. Another reason which the Magistrate gave for declining to take evidence was that some mutation case was going on between the parties, and a third reason which is also alluded to is that the plaint which was filed in the case showed clearly that both parties were struggling to collect the rents. The wording of the section is very clear. Under S. 146 the Magistrate has got no jurisdiction to issue any order for the attachment of property unless and until he has made the inquiry which is contemplated by S. 145, that is to say, until he has received and considered the evidence which the parties put before him.

If upon consideration of that evidence he is unable to find clearly which of the parties is in possession, he is then entitled to take action under S. 146 and have the property attached, but until an inquiry has been made there is no jurisdiction to issue an order of attachment such as has been made in this case. I therefore set aside the Magistrate's order and send this case back to him with a direction that he do proceed in the manner required by law.

B.V./R.K. *Application accepted.*

A. I. R. 1914 Oudh 32

LINDSAY, J. C. AND STUART, A. J. C.

Malik Husain—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeals No. 24 and 30 of 1914, Decided on 16th February 1914, from order of Sess. Judge, Lucknow, D/- 12th January 1914.

(a) Evidence Act (1 of 1872), S. 27—Confession to investigating police officer is not admissible — He should not be allowed to depose it—Criminal P. C. (1898), S. 162.

Where a Police Sub-Inspector, the investigating officer in a murder case, was inter alia informed by the accused of the fact that the latter had committed the murder, and the Sub-Inspector was allowed to depose to regarding this information :

Held : that such information not being admissible in evidence under S. 27, Evidence Act, the Sub-Inspector should not have been allowed to state in Court that the accused said that he had committed the murder. [P 33 C 1]

(b) Criminal P. C. (5 of 1898), S. 342—S. 342 applies to proceedings before Magistrate even cases triable by Sessions Court—Scope of S. 342 explained—Replies by accused can be used against him but their admissibility is not governed by S. 27, Evidence Act—Question of inquisitorial nature cannot be asked.

The provisions of S. 342 apply to all sorts of proceedings in Magistrates' Courts, whether the case is one triable by a Court of Session or otherwise. [P 35 C 2]

Under S. 342 a Magistrate is empowered at any time and without any previous warning to put questions to the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, and under sub-S. (3) of the same section the answers which the accused gives to questions so put may be used in evidence against him. The admissibility of the accused's statement thus made is not necessarily governed by those sections of the Evidence Act which relate to the admission of confessions, as the statement is not made extra-judicially. [P 35 C 2 ; P 36 C 1]

But under S. 342, Criminal P. C., a Magistrate is not juristified in putting to the accused questions of an inquisitoral nature [P 37 C 1]

H. P. Douglas—for Appellant.

Govt. Pleader—for the Crown.

Judgment.—Malik Husain has been convicted in the Court of the Sessions Judge of Lucknow on two separate charges of murder and has been sentenced to death in each case. He appeals against each of these sentences and in each case the record has been sent up to this Court for confirmation of the sentence of death. The proceedings in the Magistrate' Court previous to commitment dealt with both cases together. The Sessions Judge however held separats trials in respect of each offence. In one of the cases the wife of the prisoner Malik Husain was also accused. She has been acquitted. It will be convenient to deal in the first place with Criminal Appeal No. 24 which relates to the case in which the prisoner has been found guilty of having murdered an old woman, named Mt. Maiki, on 2nd November last. The following facts are deposed to by the prosecution witnesses in this case. We have it from the evidence of Kusher, the son of the murdered woman, that Mt. Maiki was in the habit of selling vegetables at various houses in the city. On 2nd November last she left her home in the morning and did not return again. Kusher waited several days without feeling any particular anxiety, for, as he explains, his mother was sometimes away from home for several days at a time and in particular she used to visit the house of one Janki Prasad, a Brahmin. However after four or five days had gone he went and made a report at the police station. Some days after this while he was still pursuing his inquiries, Kusher and his aunt Mt. Chando (a sister of Mt. Maiki) came to the house of the accused. They knew the accused as being a customer of the old woman and they inquired whether Maiki had been to the house on the day of her disappearance. According to Kusher's story the prisoner admitted that Maiki had come to his house on that day and that she had been paid a some of Rs. 6 which was owing to her. Kusher also swears that the prisoner told him that the following morning he had paid Mt. Maiki a sum of Rs. 11 near the city station after which the old woman went on to Golaganj. In the course of time Kusher conveyed this information to the police with the result that a visit was paid to the house of the prisoner on 21st November by Sub-Inspector Kali Charan, the policer officer in charge of the Wazirganj Thana. Kali Charan deposes that he searched the accused's house on that day but found nothing of an incriminating nature. He took Malik Husain under arrest the same evening and placed him before Inspector Sardar Mal Singh on the following day, that is 22nd November.

It appears that in consequence of information given to Sub-Inspector Kali Charan by the accused he went to the

latter's house. In his evidence Sub-Inspector Kali Charan was allowed to depose regarding more of this information than was admissible in evidence under the provisions S. 27, Evidence Act. The Judge should not have allowed the Sub-Inspector to state in Court that the accused said that he had murdered Mt. Maiki. However the rest of what he stated to the Sub-Inspector is clearly admissible, namely, that Mt. Maiki's body was in his house. It was this information which set the police in motion and led to the discovery of the corpse. Proceeding with this evidence, the Sub-Inspector deposes that when he came to the house the prisoner pointed out a room, saying that the body was in that room. The floor was dug up and after some time a corpse was unearthed which was at once indentified as that of Mt. Maiki. The features were easily recognizable and it is proved that the old woman's son Kusher was present at the time and recognized the body. At the time of her disappearance the old woman had been wearing certain ornaments. None of these were found upon the cropse discovered in the room in the accused's house. A few clothes wore on the body which Kusher identified as those which his mother had been wearing on the day of her disappearance.

The medical evidence shows that the old woman's throat had been cut. Meantime it would appear that the prisoner also gave certain information relating to the disposal of the property in the shape of ornaments which the old woman had on her person and he also gave further information relating to certain other property which is said to have been stolen from the house of one Ahmad Jan in February 1913, when Ahmad Jan was murdered. After several day's remand the prisoner appears to have been put up before the City Magistrate on 28th November and on that date there was taken the evidence of Inspector Mal Singh and of two police constables. The evidence of these two latter witnesses is of a formal character, but the evidence of Mal Singh sets out most of the facts which had been discovered against the accused. On this same date, that is to say, 28th November after Mal Singh's evidence was recorded the Magistrate took down a statement of the accused which is on the record and which had been produced in evidence against him. This statement, it may be remarked, relates to both charges of murder upon which the accused was put on his trial. For the present purpose it is necessary only to refer to that portion of it which is concerned whith the story of the murder of Mt. Maiki. The Magistrate asked the accused if the corpse of Mt. Maiki had been recovered from his house. The accused's answer was that it had been. He was then asked how the corpse came to be in his house. The prisoner then told the following story. He said that he used to receive visits from a man named Muhammad Yusuf. This Muhammad Yusuf, he said, having seen Mt. Maiki suggested that it would be a good thing to get hold of her ornaments. The prisoner said that a crime of this kind would cause great trouble and disturbance. Upon this he was assured by Muhammad Yusuf that there would be no trouble. He stated that Muhammad Yusuf suggested that the woman should be called the next day and then he (the prisoner) would see how beautifully the affair could be managed. The accused then went on to say that he called Mt. Maiki the next day and told her he was going to pay her some money. She is said to have come between 5 and 6 o'clock.

The prisoner says he put her off and said he was going out to get the money from a Mahajan. While he was out he met Muhammad Yusuf in the chauk and brought him home with him. Muhammad Yusuf and he then went into a room with the old woman. The story proceeds that Muhammad Yusuf took up a cabbage and remarked it was rotten. Mt. Maiki got annoyed and said that it was not. Muhammad Yusuf is then said to have taken out a phial which contained red oil. He rubbed a little of it on the cabbage and asked Mt. Maiki to see for herself if the cabbage was rotten or not. Maiki smelt the oil on the cabbage and at once became unconscious. After that Yusuf removed her ornaments and then cut her throat. The accused went on to describe how the corpse was buried in the house. He was then asked what became of the property which was in the old woman's possession and his answer was to the effect that the next day he and

Yusuf went out to sell the ornaments. The prisoner stated that he took some earrings to a Hindu who refused to buy them. Yusuf, he says, was at this time standing behind him. Then the prisoner went on to say that the next day he sold all the ornaments of the old woman to a Sunar named Abid Ali. When the prisoner was put on trial before the Sessions Judge this statement was read out to him and he was asked if he made it. His reply was that he had made this statement, but it was not correct. He then proceeded to allege that he had been laid hold of by the police on the morning of 20th November, that he had been tortured and otherwise maltreated while in police custody. He stated that a search was made at his house, but nothing was found in it. He alleged that the place where the old woman's body was afterwards found had already been dug up. He further suggested that he had been encouraged to make his former statement by promises made to him by the Sub-Inspector of Police who said that he would get him off.

He denied that Mt. Maiki's corpse was found in the house and suggested that after the search, which he alleged to have taken place on 21st November, the corpse must have been introduced in some way by the police. We may refer now to the other evidence in the case. We have the statements of Bahadur dhobi and his wife Imaman, P. W. 4 and P. W. 5. These persons live next door to Malik Husain and depose that they used to do washing for him. Mt. Imaman gave evidence to the effect that she saw the old woman Maiki inside Malik Husain's house one night at about 9 o'clock. According to Bahadur this was about 15 days before the body was found. Bahadur himself does not appear to have seen Mt. Maiki on that night, though he says that his wife had told him that Mt, Maiki was inside the accused's house waiting there for her money. Bahadur however does depose that he saw Malik Hussain coming home that night at about 10-30 P. M. The evidence of Inspector Mal Singh relates principally to the discovery of the corpse inside the accused's house. The evidence of Sub-Inspector Kali Charan has already been referred to and we come finally to the statements of three witnesses whose evidence relates to the disposal of the ornaments which Mt. Maiki had been wearing at the time of her death. Jagannath, P. W. 11, swears that he knows the accused. His statement was to the effect that four or five days after the Dewali (that would be about 3rd November) the accused came to his shop in the evening and tried to sell him five gold earrings. The gold earrings were like a particular gold earring which was produced in Court (Ex. E.). This, latter earring belongs to Mt. Chando, who is the sister of the deceased woman, and Chando in her evidence has sworn that Mt. Maiki was in the habit of wearing exactly similar earrings. To go on with Jagannath's story, he explains why he refused to buy the earrings. The prisoner is a Mahomedan. The earrings were such as are generally worn by a Hindu woman, and the accused was not able to give him a satisfactory account of his possession of them.

In particular the witness asked the accused why he only brought five earrings when six were usually worn. The odd number seems to have attracted the suspicion of Jagannath. The prisoner also told Jagannath that he had won these ornaments in gambling. Jagannath however refused to have anything to do with the purchase of these articles. Then we have the statement of P. W. 12, Agha Jani, a boy of 14. According to his story the accused brought him a pair of silver bangles and a silver necklet on the 3rd November. It would appear that the business is done by Agha Jani's elder brother Abdul Ali and that the accused was told that Abdul Ali was away at the time. We have the statement of Abdul Ali, P. W. 13. He deposes that on the 3rd November he heard from his brother of the visit of the accused. The next day, that is to say, the 4th November, he swears the prisoner brought him a pair of silver bangles and a silver necklet. The weight of these ornaments was Rs. 67. The witness bought them for Rs. 53 and melted them down a few days after. On the following day, Abdul Ali swears, the accused brought him five gold earrings weighing one tola and six and a half mashas. The witness bought these earrings for Rs. 37, melted them down and sold the gold a day or two after to Jagan-

nath P. W. 11, whose evidence has already been referred to. Jagannath corroborates Abdul Ali as to the purchase of this gold. From this statement of the case for the prosecution it will be apparent that there is a great deal of circumstantial evidence in this case to connect the prisoner Malik Husain with the murder of Mt Maiki. In fact it may, we think, fairly be said that the evidence is conclusive as to his guilt. It is important to notice one statement made by Mt. Maiki's son Kusher in his evidence. He was asked to give a description of the ornaments which his mother was wearing at the time she went away and in his statement he said she had been wearing five gold earrings This statement is to be found in the vernacular record of the Sessions Court, though it does not appear in the English memorandum taken down by the Judge. Then, as already pointed out, the witnesses to whom these earrings were offered, namely, Jagannath and Abdul Ali, both depose that the five earrings which were presented to them were exactly similar to the earrings, Ex. E., produced in Court and which is the property of the deceased woman's sister Chando.

It may be noted here that the vernacular record shows that Abdul Ali did state before the Judge that the earrings offered to him were similar to the earring Ex. E. This evidence therefore seems to make it quite clear that earrings which were being worn by Mt. Maiki on the morning of 2nd November were offered for sale on 3rd November by the accused Malik Husain. We have the fact which, in our opinion, is proved beyond all possible doubt that the corpse of this old woman was disinterred in a room which was in the occupation of the prisoner. We may remark here that the story told by the prisoner before the Sessions Judge as to how this corpse came in his house is altogether incredible. It is impossible to believe that after a search had been made on the 21st in the course of which the ground was dug up without any result, the police should by the next day have been able to get hold of the corpse of Mt. Maiki and to plant it in a room belonging to the prisoner. That is an altogether impossible story. We may also mention here another circumstance which has been deposed to by Kusher and other witnesses. It is proved that at the time the body was found in the prisoner's house there was also found a seer weight which Kusher was able to identify as the weight which had been used by his mother in her trade of selling vegetables. Then we have the evidence of the dhobi and his wife. There seems to be no reason for supposing that the latter has been giving false evidence when she says that she saw the deceased woman inside the prisoner's house at 9 o'clock at night, and over and above this if anything more is necessary we have the statement made by the accused to the Magistrate on the 28th November. The learned counsel who has appeared for the prisoner, has challenged the procedure of the Magistrate and has asked us to ignore the statement made on the above date on the ground that it was improperly taken. We are unable to agree that there is any reason whatever why the statement should not be taken into account against the accused. The Magistrate was inquiring into a case triable by a Court of Session and so far as recording of the accused's statement is concerned his procedure was governed by Ss. 209 and 210, Criminal P. C. The learned counsel suggested that the Magistrate had no right to record a statement of the accused at that particular stage, but in putting forward this argument he seems to have forgotten the provisions of S. 342, Criminal P. C., which apply to all sorts of proceedings in Magistrates' Courts whether the case is one triable by a Court of Session or otherwise. Under that section a Magistrate is empowered at any time and without any previous warning to put questions to the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, and sub-S. (3) of the same section provides that the answers which the accused gives to questions so put may be used in evidence against him. There can be no doubt that at the time the Magistrate examined the prisoner touching the story of the murder of Mt. Maiki, he had already on record evidence which he was justified in asking the accused to answer.

There was the evidence of Inspector Mal Singh to the effect that the old woman's corpse had been discovered in the accused's house on information given

by the accused himself. There was also his evidence as to the information given by the prisoner regarding the disposal Mt. Maiki's property. It cannot therefore be said that the Magistrate was not in order in asking Malik Husain the two questions he did. They merely called upon him to give any answer he could to the statements already made by Inspector Mal Singh. Then it is said that if the statement be treated as a confession it is a confession which was afterwards retracted with allegations of torture and of inducements held out to the accused. We do not think that the admissibility of this statement is necessarily to be governed by those sections of the Evidence Act which relate to the admission of confessions. The statement was not made extra-judicially. The case for the prosecution had already begun and the statement was given under the provisions of S. 342, a section which, as has already been pointed out, does make the answers of the accused admissible in evidence against him. But even if we are to take notice of any argument that this statement was in the nature of a confession and that it was brought about by some pressure or inducement, all we need say is that there is no proof of this upon the record.

The learned counsel has complained that the Judge ought to have made some inquiry into this matter. It does not appear that the accused ever at any time suggested until he came into the Sessions Court that any inducement or threat had been employed in order to oblige him to make the statement. After 28th November he was again examined on 5th December. In that statement he never suggested that the police had, in any way, maltreated him or made him any promises, and again on 15th December when the charge was read out to him he omitted to make any mention of any improper pressure brought upon him by the police. No questions were put to the police in the course of the Sessions trial which would suggest that there was any foundation for the charge of undue influence, and altogether we are unable to find any ground upon which, if the statement is to be treated purely as a confession, it can be rejected as having been improperly obtained. The assessors were satisfied that the charge was proved against the prisoner and in that opinion we agree. It appears to us that apart from any statement made by Malik Husain the charge of murder was clearly established against him by the circumstantial evidence on the record. Agreeing therefore with the Court below we dismiss the appeal of Malik Husain. We find that he was rightly convicted of the murder of Mt. Maiki. We dismiss the appeal and confirm the sentence of death passed upon him in connexion with this charge and direct that it be carried into effect.

There remains the other case, Criminal Appeal No. 30 of 1914. This case is by no means as clear a case as the one which we have been discussing. We shall content ourselves with referring very briefly to the evidence which is upon the record. There can be no doubt that in February 1913 a man named Ahmad Jan was murdered. At that time the prisoner Malik Husain was living in a house not far from Ahmad Jan's and there is plenty of evidence to show that he was on friendly terms with Ahmad Jan and used to visit him. Ahmad Jan was murdered while his womenfolk were away from the house and after the murder was discovered there is police evidence to show that suspicion fell upon this accused, Malik Husain. One reason for this suspicion was the fact that at the time the corpse of Ahmad Jan was discovered there was found near it a hukka, admittedly the property of the prisoner. The women of Ahmad Jan's house also suspected Malik Husain of having been concerned in the murder. The police however were unable to get sufficient evidence upon which to send the accused up for trial and the matter dropped. After Malik Husain was arrested in connexion with the matter of Mt. Maiki, he gave certain information to the police which resulted in the recovery of a large number of articles (jewelry and valuable clothes principally), articles which are said to have been the property of Ahmad Jan and which were taken away at the time of the murder.

The evidence shows that it was the information given by Malik Husain himself which led to the recovery of these articles from a pawnbroker and from other people who had purchased them. Speaking generally of this evidence it would seem that the prisoner had not made any attempt to dispose of this pro-

perty till several months after the murder had taken place. The earliest point of time at which any of the witnesses speak of having received any of these incriminating articles was about the month of April. Otherwise the evidence relates to a disposal of the property at a much later time, namely from July or August onwards. By itself this evidence would not be sufficient to bring home a charge of murder to the prisoner. But the learned Judge was of opinion that a statement made by the accused on 28th November before the committing Magistrate rendered the case complete against him. We have already referred to this statement in connexion with the other appeal. The statement was made after Inspector Mal Singh had deposed to information having been given by the accused which had resulted in the recovery of articles said to have belonged to the deceased man Ahmad Jan. The Magistrate put certain questions to the prisoner regarding this information, questions which have been attacked by the learned counsel here as being improper.

We certainly think some of those questions ought not to have been asked in the form in which they were asked, for, assuming the examination to have been under S. 342, Criminal P. C., the Magistrate was not justified in putting questions of an inquisitorial nature. We find for example that after the accused had been asked if he pointed out the places where the property belonging to Ahmad Jan was recovered and had answered in the affirmative he was asked: "Did you steal the property?" Later on after the prisoner had described how he and certain people came to meet at the house of Ahmad Jan he was again asked an improper question, namely, what had been arranged between him and those people. We find that the prisoner made a statement to the effect that he had witnessed the murder of Ahmad Jan. He said that it had been agreed that he and some others should go and play cards with Ahmad Jan and should kill him. He mentioned how he, Taqi Husain, Jafar Husain and a villager came to Ahmad Jan's house. Then he went on to say that Jafar Husain and the villager seized Ahmad Jan while the latter cut his throat with a big knife. The accused said that he got sick at the sight of the murder and had to be taken home and that afterwards the murderers brought the property to his house where he kept it concealed for some time and afterwards disposed of it to various people. Later on the accused resiled from this story by saying that he had never admitted that the property belonged to Ahmad Jan, but said that it had belonged to himself. He also told the Sessions Judge that the statement which he had made in connexion with Ahmad Jan's case had been got out of him by promises of his being let off. This is not a complete case against the prisoner in connexion with the charge of having murdered Ahmad Jan and we feel extremely doubtful whether he could safely be convicted upon such evidence.

The disposal of the various articles by the accused at different times after the murder is quite consistent with his story that Ahmad Jan's property was handed over to him by the murderers and so far as his connexion with the murder is concerned it rests entirely upon the statement made on 28th November 1913—a statement which he afterwards qualified or withdrew. We think in the circumstances the safer course is to hold that this charge of murder of Ahmad Jan was not fully brought home to the prisoner.

We allow this appeal therefore and direct that Malik Husain be acquitted on this charge. As however his conviction for the murder of Mt. Maiki has been confirmed, and as he has now been sentenced to death there can of. course be no order for release in this case.

B.V./R.K. *Appeal No.* 30 *dismissed*; *Appeal No.* 24 *allowed.*

A. I. R. 1914 Oudh 37

STUART AND KANHAIYA LAL, A. J. Cs.

Rameshar Bakhsh Singh — Plaintiff—Appellant.

v.

Sankata Bakhsh Singh and *others* — Defendants—Respondents.

First Appeal No. 11 of 1913, Decided on 22nd April 1914, from decree of Sub-Judge, Rae Bareli, D/- 31st October 1912.

(a) Oudh Rent Act (12 of 1886), S. 3 (8)—Under proprietor's rights are not exhaustively defined in S. 3 — Right of re-entry of proprietor is barred against under proprietor —Difference between superior and under proprietor pointed out.

The right of an under proprietor is not exhaustively defined in S. 3 (8). [P 40 C 2]

In addition to the elements of heritability and a transferability there is one essential factor in under proprietary rights, viz., that in no circumstances is the proprietor afforded a right of re-entry against the under proprietor. [P 40 C 2]

Where an under proprietary right exists the position of the under proprietor is that he holds rights almost as great as those of the superior proprietor, subject to the limitation that he has to pay the land revenue and the cesses and usually something by way of malikana to the superior proprietor. [P 40 C 2; P 41 C 1]

(b) Landlord and Tenant—Lease providing for resumption on breach of condition does not create under proprietorship.

A lease imposed upon the lessee certain conditions to be fulfilled by him and provided for the lessor resuming the leasehold in case the lessee failed to satisfy any of those conditions:

Held: that the lease did not confer an under proprietary right on the lessee. [P 41 C 1]

Gokaran Nath Misra—for Appellant.

Samiullah Beg—for Respondents.

Judgment.—The plaintiff in this suit is the Talukdar of Samarpaha. The taluka was owned and possessed by Basant Singh who died on 12th November 1859, leaving as his heir his widow, Thakurain Daryao Kunwar, in whose favour, after the proclamation of March 1858, the second summary settlement was made. A sanad was subsequently granted to this lady in respect of the taluka. On preparation of the lists of talukdars under the provisions of S. 8, Act 1 of 1869, her name was entered in lists 1 and 2. She admittedly became talukdar in her own right and not in the right of her husband. Daryao Kunwar died on 13th November 1893 and was succeeded by Sher Bahadur Singh, who alleged that he was her adopted son. The present appellant instituted on 27th May 1899 a suit for possession of the taluka on the ground that he was entitled to succeed as next heir, he being the grandson of a brother of the Thakurain. His suit was decreed by the Subordinate Judge, whose decision was upheld by the Court of the Judicial Commissioner and finally by their Lordships of the Privy Council by an order dated 27th July 1906. On 27th June 1867, Thakurain Daryao Kunwar executed a deed in favour of a certain Mt. Sheoraj Kunwar with respect to the village Risalpur Lotanha. Under the terms of this deed Mt. Sheoraj Kunwar, the wife of Indarjit Singh, Trilokchandi Bais, was placed in possession of the village of Risalpur Lotanha on the following conditions: She paid Rs. 462 land revenue, Rs. 30 patwari fund cess, and Rs. 36 chaukidari fund cess, making a total of Rs. 528 to the talukdar. She further paid out of the profits of the village an annuity of Rs. 100 to a certain Mahipal Singh, an annuity of Rs. 100 to a certain Sheopal Singh and an annuity of Rs. 100 to a certain Sheo Prasad Singh and defrayed costs of worship estimated to amount to Rs. 62 a year. The deed stated that the letting value of the village amounted to Rs. 990. The amounts payable to the annuitants and the costs of worship came to Rs. 362 which, added to the land revenue and cesses raised the total to Rs. 890, and under the terms of the deed the remaining Rs. 100 were retained by Sheoraj Kunwar for her own use. The deed contained other conditions which will be discussed later. Mt. Sheorai Kunwar died about the year 1891. She predeceased her husband Indarjit Singh, who is still alive. At the time of her death Sat Narain Singh, Hardeo Bakhsh Singh and Mahadeo Bakhsh Singh, sons of Indarjit Singh and Sheoraj Kunwar were alive. On the death of Sheoraj Kunwar, her son, Sat Narain Singh, took possession of the village.

The settlement of the Rae Bareli District was being made in 1894, and in that year Sat Narain Singh made an application for the entry of his name alone in place of that of his deceased mother, on the allegation that he and his mother had been in possession of Risalpur Lotanha under a perpetual lease, that his mother had died three years before and that under the terms of the deed mutation should be effected in his favour. Notice of this application was given to Sher Bahadur Singh who was then talukdar in possession. The talukdar opposed the entry of the name of Sat Narain Singh. The Settlement Officer by an order dated 7th May 1895, entered the name of Sat Narain Singh as perpetual thekadar of the village. The Settlement Commissioner on appeal slightly modified this entry by an order dated 9th August 1895, and under the order of the Settlement Commissioner the entry stated the payments of land revenue, cesses, annuities and expenses of worship to be defrayed by the lessee which have already been detailed. In the year 1896 Sat Narain Singh applied for the addition of the name Bije Bahadur Singh, a

grandson of Sheo Prasad Singh, one of the annuitants already mentioned, as a co-lessee in the village. That application was granted. The entries of the names of the co-lessees in the revenue papers now stand as follows: The co-lessees recorded are: (1) Sankata Bakhsh Singh and Kalka Bakhsh Singh, sons of Sat Narain Singh; and (2) Trilok Bahadur Singh, Fateh Bahadur Singh and Maharaj Bahadur Singh, sons of Bije Bahadur Singh, deceased. These five persons are the defendants in the present suit.

It is to be noted that the names so recorded are: (1) the names of the descendants of one of the three sons of Sheoraj Kunwar, lessee; and (2) the descendants of one of the two sons of Beni Bahadur Singh, the son of Sheo Prasad Singh, one of the annuitants. Hardeo Bakhsh Singh, son of Sheoraj Kunwar, who is apparently one of her heirs and who is still alive, is not entered as a lessee. Bhawani Bakhsh Singh, son of Mahadeo Bakhsh Singh, son of Sheoraj Kunwar, is also not entered as a lessee. Kunwar Bahadur Singh, who is still alive, brother of Bije Bahadur Singh, is not entered as a lessee. The heir of Sheopal Singh, annuitant, is not entered as a lessee. Mahipal Singh, annuitant, was the father of Indarjit Singh, husband of Sheoraj Kunwar; Indarjit is not entered as a lessee. Thus the present entry in the revenue papers does not give the names of all the heirs of Sheoraj Kunwar or of all the heirs of the annuitants. It gives the names of certain of the heirs selected upon no principle that has been explained to us. The present appellant sought to eject the present defendants in the year 1320 Fasli. The defendants contested the notice of ejectment in the revenue Court, which by an order dated 9th April 1912 cancelled the notice of ejectment. The revenue Court in this order did not confine itself to a finding that the lessees held under a perpetual lease. It went further, and suggested that they were under proprietors. The plaintiff then sought a declaration in the present suit by a plaint dated 15th and 17th May 1912 to the effect that the defendants do not possess any proprietary or under proprietary rights in respect of the village save the rights of ordinary thekadars. In the course of hearing the plaintiff withdrew the claim to the declaration that the defendants only possessed the right of ordinary thekadars, and confined himself to seeking a declaration that they are not proprietors or under proprietors. The learned Subordinate Judge dismissed his suit, and the present appeal is preferred.

We desire to make it clear that the point for decision in this appeal is, whether the defendants possess proprietary or under proprietary rights in the village. We have not to decide, whether, if they are lessees of the village, their rights are the rights of ordinary thekadars. We are only concerned with the determination of the question, whether they have or have not proprietary or under proprietary rights. The learned counsel for the respondents does not suggest that they have proprietary rights, and the question for our decision is thus narrowed down to the one point, whether they do or do not possess under proprietary rights.

The deed of 27th June 1867 is before us and it is now admitted by the learned counsel for the appellant that the finding of the learned Subordinate Judge to the effect that this deed was executed by Thakurain Daryao Kunwar, who, as talukdar in her own right had complete power of transfer, is a correct finding. The deed is not such a deed as would have been prepared by a skilled conveyancer. It contains many omissions and leaves undecided a large number of points of importance. Although at the end of the deed the instrument is declared to be an instrument of perpetual lease, there is no provision stating that the benefits under the deed are to accrue after the death of Sheoraj Kunwar to her heirs. The deed contains provisions as to the payments of annuities to certain specified persons, but there is no provision as to the continuance of these annuities to the heirs of those persons after their deaths. It commences by reciting that a lease is executed in favour of Sheoraj Kunwar on condition that the amounts already detailed shall be paid in due season without objection or dispute, that Sheoraj Kunwar shall treat the tenants properly and kindly, that she shall undertake to increase the income of the village by diligent management, and that she shall not claim exemption of payment of the

sums due under the deed by seasonal calamities. It is then stated that these conditions shall hold good during the lifetime of Daryao Kunwar, and that during that lady's lifetime Sheoraj Kunwar shall hold possession of the village as a thekadar.

A provision is then enacted that, after the death of Daryao Kunwar, Sheoraj Kunwar shall obtain full powers over the said village on the condition that she pays the Government land revenue and the village expenses, and that she shall take the entire village with rights of wood and water and all rights appurtenant, great and small, into her proprietary possession and use, and that no right or claim against Sheoraj Kunwar shall remain with the heirs of Daryao Kunwar, the only right of claim against Sheoraj Kunwar being vested in Daryao Kunwar herself. The deed continues that the lessee shall ever remain faithful to Thakurain Daryao Kunwar with heart and soul, and that she shall offer oblations of cakes and water to the ancestors of Daryao Kunwar. Then follows a clause that, in the event of Sheoraj Kunwar not complying with the terms of the deed and in the event of there being any failure in the condition of the aforesaid lease or any breach of fidelity or loyalty, Thakurain Daryao Kunwar shall have the power to resume and assume direct management of the village, and that Sheoraj Kunwar shall have no right to make any objection to such resumption. In addition to the omissions already mentioned, it is to be observed that in that portion of the deed which relates to the contingency of the occurrence of the death of Thakurain Daryao Kunwar, no provision is made for the payments of the annuities to Mahipal Singh, Sheopal Singh and Sheo Parsad Singh. The terms of the deed do not make it clear whether Thakurain Daryao Kunwar intended these annuities to be paid after her death. In consequence of the obscurity of the terms of this document, there has been a large amount of argument devoted to its provisions.

The learned counsel for the appellant has argued that the deed is in effect a lease on favourable terms granted to Sheoraj Kunwar for her lifetime alone, that the word "perpetual" is meaningless and that on the death of Sheoraj Kunwar all rights under the deed terminated. He has further argued that in view of the fact that Sheoraj Kunwar predeceased Thakurain Daryao Kunwar, the contingencies providing for the event of Thakurain Daryao Kunwar's death need not be considered. He therefore urges that in no circumstances can the deed be considered to have conferred under proprietary rights upon Sheoraj Kunwar. The learned counsel for the respondents has asked us to interpret the provisions for this deed as conferring under proprietary rights upon Sheoraj Kunwar and her heirs, subject to the condition that these under proprietary rights, although vested in Sheoraj Kunwar and her heirs from the date of the execution of the deed remained dormant and did not come into effect until the death of Thakurain Daryao Kunwar. We do not propose to decide whether the rights conferred upon Sheoraj Kunwar were inherited by her heirs. We are able to decide this appeal without arriving at a finding upon that point; and in view of the fact that the terms of the deed may have to be considered subsequently in a rent Court and not in a civil Court, we consider it advisable to express no opinion which may be utilized to affect the decision of such a Court. The right of an under proprietor in Oudh is not exhaustively defined in Act 22 of 1886. S. 3, Cl. 8, of that Act states that an under proprietor means any person possessing a heritable and transferable right of property in land for which he is liable to pay rent. Mt. Sheoraj Kunwar certainly possessed a right of property in the village, for which she was liable to pay rent. We do not propose to decide whether that right was heritable, and, for the purpose of the decision of this appeal, it is not even necessary to decide whether that right was transferable; but in addition to the elements of heritability and transferability there is one essential factor in under proprietary right in Oudh, which we find to be absent in the right possessed by Mt. Sheoraj Kunwar.

In no circumstances is a proprietor afforded a right of re-entry against an under proprietor in Oudh. Where under proprietary right exists, the position of the under proprietor is that he holds rights almost as great as those of the superior proprietor, subject to the limitation that he has to pay the land revenue

and the cesses and usually something by way of malikana to the superior proprietor. It not is absolutely essential that there should be a condition to pay malikana and, if it were essential, that condition would be fulfilled in the present instance, owing to the provision in the deed that Mt. Sheoraj Kunwar should pay certain annuities on behalf of Thakurain Daryao Kunwar and should also pay the expenses of religious worship offered to the latter's ancestors. But the proprietor cannot, even if land revenue and cesses be not paid under the terms of the agreement by the under proprietor, eject the under-proprietor. S. 152, Act 22 of 1886, provides that in the event of the existence of a decree against the under proprietor for arrears of rent due in respect of an under proprietary right, the interest of the judgment-debtor in that right may, subject to the provisions of the Act, be sold in execution of the decree. But the remedy is not given that, in the event of the existence of such a decree, the under proprietor may be ejected from his rights as under proprietor. The fact that this deed contains a right of re-entry is sufficient in itself to show that Mt. Sheoraj Kunwar was not an under proprietor whatever else she may have been.

The learned counsel for the respondents has urged in the course of his address that the question of limitation should have been decided in his favour. We find against him upon this point. The suit as it is before us is a suit simply for a declaration that the defendants possess no under proprietary rights and there was no determination to the effect that they did possess under proprietary rights until the year 1912.

For the above reasons we find that the defendants have no proprietary or under proprietary rights in the village. The plaintiff has asked solely for a declaration to the effect that they have no proprietary or under-proprietary rights. The defendants have asserted that they have under proprietary rights, and the plaintiff is therefore entitled to a decree to the effect that they have no proprietary or under proprietary rights.

We accordingly allow this appeal and direct that such a decree be passed. The respondents will pay their own costs and those of the appellant in both Courts.

B.V./R.K. *Appeal allowed.*

A. I. R. 1914 Oudh 41

KANHAIYA LAL AND SABONADIERE, A. J. Cs.

Mahabir Bakhsh Singh—Applicant.

v.

Sheoraj Singh and *another*—Opposite Parties.

Privy Council Appeal No. 6 of 1913, Decided on 14th July 1913, on application for leave to appeal to His Majesty in Council.

Civil P. C. (5 of 1908), S. 109, Cl. (a)—Order rejecting review.

An order rejecting an application for review cannot be regarded as an order appealable under Cl. (a), S. 109. [P 42 C 1]

Jag Mohan Nath Chak and *Man Mohan Nath Chak*—for Applicant.

A. P. Sen—for Opposite Parties.

Judgment.—This is an application for a certificate of leave to appeal to His Majesty in Council from an order of this Court refusing to grant a review. The decision sought to be reviewed was a judgment of this Court affirming the decision of the Court of first instance. The suit affected property worth more than Rs. 10,000 in value. No application was made for leave to appeal from the decree affirming the decree of the Court of first instance within the time allowed by law. The present application was made under S. 109, Civil P. C. The contention of the learned counsel for the applicant is that an order refusing to grant a review is a final order passed on appeal and that an application consequently lies for leave to appeal to His Majesty in Council under Cl. (a) of the section. It is also contended that the application in any case falls under Cl. (c) of that section.

We do not think that an order refusing to grant a review is a final order passed on appeal because the appeal had been decided before the application for review was made. If an application for review is granted the appeal is restored to file and re-heard, but till such application is granted the application for review can only be regarded as an independent proceeding arising out of but not affecting the disposal of the appeal previously decided. An order rejecting an application for review is final under O. 47, R. 7, Civil P. C., but as held in *Radha Kishen* v. *Jamna Prasad* (1), by this Court on the authority of previous decisions in *Soudaminee Dossee* v. *Maharaja Dheeraj*

(1) [1910] 13 O. C. 59=5 I. C. 940.

Mahatab Chand Bahadoor (2), *Rajah Enayet Hossein* v. *Ranee Roushan Jehan* (3), and *Babu Sakan Singh* v. *Gopal Chandra Neogi* (4), the words "final order passed on appeal" in S. 109 of the Code are not equivalent to a "final order passed in the exercise of final "appellate jurisdiction." The words "final order passed on appeal" have always been held to imply orders disposing of an appeal at the hearing. In the present case the appeal had been disposed of as has already been stated before the application for review was made and the order passed on the application for review cannot therefore be regarded as an order appealable under Cl. (a), S. 109, Civil P. C. In *Sunder Koer* v. *Chandishwar Prasad Singh* (5) an order pased by the High Court rejecting an application under S. 206, Civil P. C., to amend a decree was held to be not an order on appeal and therefore not appealable to His Majesty in Council. In *Karsandas Dharmasey* v. *Gangabai* (6) an order refusing to admit an appeal after the period of limitation prescribed therefor had expired was similarly held to be not a decree on appeal from which leave to appeal to His Majesty in Council could be granted.

The next question is whether the application can be granted under S. 109, Cl. (c), of the Code. The main ground upon which the application for review was rejected was that the applicant did not satisfy the Court by strict proof that he had exercised due diligence and was unable to discover the existence of the pedigree in spite of it. Another ground was that the same pedigree was filed in a previous case in which the applicant was examined as a witness and that a copy of the judgment in which a reference was made to that pedigree was filed by the applicant in the case then under appeal. The inference drawn by this Court from that fact was that the applicant knew of the existence of the pedigree and that he did not produce it during the hearing of his claim because his predecessor-in-title, Bakhtawar Singh, was described in that pedigree as illegitimate. We do not consider that any of these grounds involve a substantial question of law. As observed by their Lordships of the Privy Council in *Banarsi Pershad* v. *Kasi Krishen Narain* (7), Cl. (c), S. 109 is intended to meet special cases such for example as those in which the point in dispute is not measurable by money, though it may be of great public or private importance. Though the dispute in this case relates to property over Rs. 10,000 in value we cannot allow the applicant merely on that ground to circumvent the plain provisions of S. 110 of the Code which forbid an appeal from concurrent decrees except on substantial questions of law by granting him leave to prefer an appeal under colour of his application for review unless there is in the application for review a substantial question of law of public or private importance at issue. We do not consider that this is a fit case in which leave to appeal to His Majesty in Council should be granted.

The application is accordingly rejected with costs.

B.V./R.K. *Application rejected.*

(2) 6 W. R. (Mis. Rulings) 102.
(3) 10 W. R. 1 (F. B.)
(4) [1904] S C. W. N. 296.
(5) [1903] 30 Cal. 679 (P. C.)
(6) [1908] 32 Bom. 108.
(7) [1901] 23 All. 227 (P. C.)

A. I. R. 1914 Oudh 42

LINDSAY, J. C.

Aparbal Singh and *others*—Plaintiffs—Appellants.

v.

Narpat Singh and *others* — Defendants —Respondents.

Second Appeal No. 133 of 1912, Decided on 17th November 1913, from order of Addl. Sub-Judge, Lucknow, D/- 4th January 1912.

(a) Evidence Act (1 of 1872), Ss. 112 and 114—Presumption is in favour of legitimacy —Burden of proving illegitimacy is on person alleging.

It is for the defendants, if they set up a case of illegitimacy, to prove that the plaintiffs are illegitimate for the legal presumption being in favour of legitimacy and marriage, the burden of proving illegitimacy lies on the person interested in making out the illegitimacy: (1905) *A. W. N.* 214, *Foll.* [P 43 C 1]

(b) Evidence Act (1 of 1872), S. 35 — Khewat entries are relevant to prove legitimacy.

An extract from the khewat, showing that the plaintiffs were reputed to be the sons of a certain person, was put in evidence to prove the plaintiffs' legitimacy:

Held: that although it was not shown that the defendants were parties to the mutation proceeding upon which the khewat entry was founded, yet the extract was relevant in proof of the legitimacy inasmuch as it showed that the plaintiffs had succeeded to their reputed

father's estate and had been regarded as entitled to succeed. [P 44 C 1]

A. P. Sen and *Salig Ram* — for Appellants.

Sri Ram Bahadur and *Har Dayal*— for Respondents.

Judgment.—This appeal arises out of a suit brought by three plaintiffs, Aparbal Singh, Surji Singh and Ijrail Singh for redemption of a mortgage. The mortgage in suit was said to have been executed on 13th July 1852 in favour of one Ramdin Singh who is now represented by the defendants-respondents. There were four mortgagors who executed this deed, one of them being Tilak Singh. The case for the plaintiffs was that they were the sons of Tilak Singh and therefore entitled to redemption.

The plaintiffs put forward a pedigree in support of their title which was denied by the defendants. The Munsif who tried the case disposed of it by a very short judgment. He found that the plaintiffs were not the legitimate sons of Tilak Singh and therefore not his heirs. He ruled therefore that the plaintiffs had no title to ask for redemption and he dismissed the suit. This order has been affirmed by the Additional Subordinate Judge on appeal. The point taken here on behalf of these appellants is that the decision of the Court below is wrong. It is argued that the burden of proof was put on the wrong party, that it was for the defendants, if they set up a case of illegitimacy, to prove that the plaintiffs were illegitimate and that this burden has not been discharged. In my opinion this is a good ground of appeal and the appeal should be allowed. The law as to the incidence of the burden of proof in a case of this kind is very clear and I may refer to the statement of it contained in Messrs. Ameer Ali and Woodroffe's Law of Evidence, p. 861, Edn. 3, where it is said: "There is a presumption in favour of legitimacy and marriage and therefore on any person who is interested in making out the illegitimacy of another is thrown the whole burden of proving it." This exposition of the law was quoted with approval in a case decided by a Bench of the Allahabad High Court in *Kalian Singh* v. *Maharaji* (1), where the learned Judge says that this is the law both in England and in India. If we turn to the written statement put in by the defence in this case it is apparent that the plea of legitimacy was never distinctly raised. In para. 8 of the written statement the defendants denied the pedigree put in by the plaintiffs, and asserted that they were not the heirs of the original mortgagors. It was not till evidence began to be taken that any allegation of illegitimacy was made and the first intimation of this plea came out in the evidence of defendant 1, Narpat Singh, who was examined by the plaintiffs as their first witness.

In his evidence Narpat Singh said as follows: "Tilak Singh had no son." Then he corrected himself by saying that Tilak had two sons by a kept woman, namely Surji and Ijrail (plaintiffs 2 and 3). Aparbal, plaintiff 1, he said was not the son of Tilak. Further on, Narpat stated that it was not till about four years before the bringing of this suit that he came to know of the illegitimacy of plaintiffs 2 and 3. All he could say was that he heard of this fact from some person whose name he was unable to give. He also stated that up till four years previous he could not say whose sons he thought the plaintiffs to be. The other witnesses examined for the plaintiffs declared that they were the sons of Tilak. For the defence one witness was put forward whose statement was to the following effect: "I know the plaintiff 1 (i. e.. Aparbal). He is a Thakur and the son of Tilak by an Ahir woman. Durjan told me this. He died 40 or 45 years ago". In cross-examination he stated that he had seen the woman who was kept by Tilak. He further added that plaintiff 1 was born in the same house in which his father Tilak Singh resided. There is not a word in this witness's statement as to the descent of the other two plaintiffs Surji and Ijrail. This is the only evidence which we have to consider in this connexion and it seems to me quite clear that if the burden of proving the illegitimacy of the plaintiffs or any of them was on the defendants, they failed to discharge it. It would be preposterous to hold on evidence like this that the plaintiffs are illegitimate.

Another point which has been referred to by the learned counsel for the appellants is that the Courts below did not take proper notice of a certain docu-

(1) [1905] A. W. N. 214.

mentary exhibit, an extract from the khewat, which went to show that the three plaintiffs were reputed to be the sons of Tilak Singh. The Subordinate Judge who tried the appeal seems to have thought that this document was irrelevant and not binding upon the defendants, inasmuch as it had not been shown that they were parties to any mutation proceeding upon which the khewat entry was founded; but at any rate it can, I think, be argued that this argument does show that the plaintiffs succeeded to Tilak Singh's estate and that they were regarded as entitled to succeed as being his sons, and in this view I think the entry is relevant in proof of legitimacy.

I hold therefore that the Courts below were in error in throwing off burden of proving legitimacy upon the plaintiffs and that the judgment is in consequence unsustainable. I allow the appeal, set aside the order of the Courts below and direct that the case be sent back through the Subordinate Judge to the Court of the Munsif for disposal after decision of the issues which were left undetermined in the judgment. The respondents will pay the appellants' costs of this appeal.

B.V./R.K. *Appeal allowed.*

A. I. R. 1914 Oudh 44

LINDSAY, J. C. AND RAFIQUE, A. J. C.

Muhammad Husain and *another*—Defendants—Appellants.

v.

Lalji Singh and *Mehdi others* - Plaintiff and Defendants—Respondents.

First Appeal No. 135 of 1911, Decided on 7th March 1912, from decree of Sub-Judge, Tahsil Biswan, D/- 28th July 1911.

(a) Practice—Pleadings—Execution denied—Alternative pleading that if executed it was under undue influence—Execution held denied.

In a mortgage suit a defendant pleaded that he never executed the mortgage deed. that if it was signed by him it was done under undue influence and that if the execution of the deed was proved the contract was void by reason of of his being minor at the time of the execution.

Held: that on the above pleadings it must be taken that the defendant did positively deny the execution of the deed. [P 47 C 1]

(b) Evidence Act (1 of 1872), S. 102—Defendant pleading minority at the time of contract—Burden to prove majority is on plaintiff.

Where in a suit upon a contract, e.g., a mortgage, a plea of minority is raised by the defendant. the burden of proving that he was of age when the contract was entered into, lies upon the plaintiff seeking to enforce the contract, for he must show that the contract is valid and legally enforceable: 13 *I. C.* 956 and 2 *I. C.* 839, *Ref.* [P 48 C 2]

(c) Evidence Act (1 of 1872), S. 35—Endorsement by registering officer about age is not conclusive proof of age as officer is not bound to record age—Registration Act (16 of 1908), S. 35.

An endorsement made on a document by a Registering Officer at the time of registration showing that the executant described himself as a major is no proof that he was so at that time, when no inference as to the age of the executant can be drawn from the body of the document itself, inasmuch as under the provisions of the Registration Act a registering officer is not bound to record the age of any person appearing before him. [P 49 C 2]

(d) Practice—Burden of proof—Statements of witnesses of other side ought to be considered when determining whether burden of proof is discharged or not.

In considering whether or not the defendant discharged the burden laid upon him of proving a certain fact, he is, apart from the evidence of his own witnesses, entitled to have taken into consideration the statements elicited from the plaintiff's witnesses in their cross-examination as regards that fact. [P 51 C 1]

(e) Civil P. C. (5 of 1908), O. 41, R. 27—Shifting of onus is no ground for allowing additional evidence in appeal if party is not taken by surprise.

A party to whom the burden of proof is shifted on by the appellate Court cannot be allowed an opportunity to produce fresh evidence in order to discharge that burden, if he is not put to any disadvantage or in any way taken by surprise in the matter by the lower Court putting the burden on the wrong party. 29 *All.* 184 (*P.C.*), *Ref.* [P 52 C 1]

Wazir Hasan for Appellants.

Ishri Prasad, *Shami Dayal* and *Shyam Sunder*—for Respondent 1.

Judgment.—This appeal arises out of a suit brought by respondent 1, Thakur Lalji Singh, in which he claimed possession as mortgagee over Mauza Bahoti. There was also a further prayer in the plaint that in the event of its not being possible to award the plaintiff possession over any portion of the said mauza he might be awarded possession of portions of two other villages named Azizpur and Daulatpur, the property of the defendants. The defendants to this suit were Chaudhri Mehdi Husain and his three sons, Muhammad Husain, Ali Hasain and Hadi Husain. The appeal before us is on behalf of two of these defendants only, namely, Muhammad Husain and Ali Husain who were respectively defendants 3 and 2 in the suit. With regard to defendant 4 Hadi Husain

the claim of the plaintiff so far as his interest in the mortgaged property was concerned was dismissed, and there is no appeal before us against this decision.The defence of the two appellants Muhammad Husain and Ali Husain to the suit brought by plaintiff-respondent 1 was to the effect that they were in reality no parties to the mortgage contract in suit. They pleaded in the first place that they never executed the mortgage in question and they further pleaded that at the time the mortgage contract referred to was entered into they were minors and that consequently the contract relied upon by the plaintiff was as regards them utterly void in law. Other pleas were also taken in defence, but for the purposes of disposing of this appeal it is necessary to refer only to the two pleas we have just mentioned.

Before going to discuss the points which arise for determination in this appeal it is necessary to set out certain facts in order to elucidate the nature of the case brought by the plaintiff in the Court below. It appears that the three villages Bahoti, Azizpur and Daulatpur belonged at one time to two brothers named Wazir Ali and Ehsan Ali in equal shares. Ehsan Ali had no issue. The defendant Chaudhri Mehdi Husain is a son of Wazir Ali and the other defendants 3 in the case who are the sons of Mehdi Husain are therefore the grandsons of Wazir Ali. It is stated that by reason of Ehsan Ali's not having any issue of his own he made over his half share in the village mentioned to the three sons of Chaudhri Mehdi Husain. The allegation is that this transfer was made by means of a gift. There is no very clear evidence as to the method in which the transfer alleged took place, but it is a fact that the names of Muhammad Husain, Ali Husain and Hadi Husain were and are still recorded in the revenue papers as the owners of an eight-annas share in each of these villages. The other eight annas share is recorded in the name of the father of these three persons, namely, Chaudhri Mehdi Husain. It may be well to note here that before the trial of the case began in the Court below, the plaintiff's pleader admitted that mutation of names with regard to an eight-annas share in each of these three villages was effected in favour of these three defendants with the consent of Wazir Ali. The learned pleader did not admit that any gift had been executed in favour of these three defendants, but he informed the Court that it was not necessary that the question of title of these defendants should be discussed in this case. It is further recorded that the same learned pleader denied the title of these defendants, but stated that they were the ostensible owners of a share of the property in suit and that even if the title were not proved the mortgage would be binding on them. The attitude of the plaintiff's pleader in this connexion is a somewhat curious one. It looks as if in spite of his client the plaintiff being the mortgagee, he was disputing the title of these three defendants whom he alleged to be his mortgagors —a position which it was not open to him to take. We need not say anything more about this part of the case except that we must take it that the suit proceeded on the footing that these three defendants were in fact owners of an eight annas share in the villages Bahoti, Daulatpur and Azizpur.

The mortgage under which this suit for possession was brought bears the date 23rd July 1902. It is admitted that the deed in question is nothing more than a fresh contract substituted in place of a previous contract dated 18th July 1900 to which we will first refer. This latter deed is a deed of mortgage with possession executed in favour of Thakur Balbhaddar Singh, the father of the present plaintiff. It purports to have been executed by Chaudhri Wazir Ali, grandfather of the appellants, and by the two appellants and their younger brother Hadi Husain. According to the recitals contained in the deed Saiyed Wazir Ali and Muhammad Husain appellant 1 in this case, executed on their own behalf, while Wazir Ali executed on behalf of the other two defendants namely, Ali Husain and Hadi Husain, purporting to act in the capacity of their guardian. It has not been explained how, while their father Chauduri Mehdi Husain was still alive, it was possible for the grandfather of of these appellants to act as guardian on behalf of any of them, nor is it clear what authority he had to dispose of the property of any of his minor grandsons by mortgage or sale. The mortgage-money under this deed was Rs. 14,000 and possession was given to the mortgagee

for a period of 10 years. As to the way in which the mortgage-money received under this deed was applied the evidence goes to show that about Rs. 7,000 of it was paid on account of a mortgage-debt due to the wives of one Sher Khan in respect of a mortgage executed in their favour on 23rd July 1897. That mortgage it may be noted was executed by Wazir Ali alone. A further sum of Rs, 6,990 is said to have been applied to the discharge of two debts due to one Ram Ghulam: one under a mortgage executed on 7th March 1898 and the other under a bond dated 9th March of the same year. Both this mortgage deed and this bond were executed by Wazir Ali and his son Mehdi Husain. The result therefore seems to be that out of this sum of Rs. 14,000 all but Rs. 12,000 was applied to satisfy debts which were due either from Wazir Ali alone or from Wazir Ali and his son Mehdi Husain. We may also note here that defendant 1 Mehdi Husain who was examined as a witness in the case, deposed that the balance of this mortgage-money was spent by his father Wazir Ali himself. Coming now to the mortgage deed in suit which as we have already said is alleged to have been executed on 23rd July 1902, we find that the effect of it is to do away with the previous possessory mortgage executed in favour of Balbhaddar Singh and to substitute therefor a simple mortgage containing a clause authorizing the mortgagee to take possession under certain circumstauces. According to the plaintiff in this suit these circumstances have come into existence and his prayer is therefore for an enforcement of possession in accordance with the clause just mentioned. The consideration for the deed of mortgage now in suit is expressed to be Rs. 16,000 made up of the following items:

(1) Rupees 14,000 due on account of the mortgage deed dated 18th July 1900.

(2) A sum of Rs. 400 due under a pro-note executed by defendant 1 Mehdi Husain;

(3) A sum of Rs. 100 on account of stamp and registration expenses; and

(4) a sum of Rs. 1,500 stated to have been paid in cash at the time the deed was registered.

According to the terms of the deed which purports to have been executed by Mehdi Husain, Muhammad Husain and Ali Husain on their own behalf and also by Mehdi Husain on behalf of his minor son Hadi Husain, the two appellants in this case Muhammad Husain and Ali Husain, were of full age (baligban). We have already stated that the two appellants now before us have denied execution of the deed in suit. The lower Court found against them on this point and held that execution by them was proved. In dealing with this question the learned Subordinate Judge who tried the case states in his judgment that defendant 2, that is to say, Muhammad Husain, admitted execution of the deed although he pleaded that he was a minor at the time of execution. In support of this statement the Subordinate Judge refers to paras. 12 and 13 of the written statement filed by Muhammad Husain. Similarly he has stated that execution was admitted in the same way by the defendent-appellant Ali Husain. In this connexion he refers to para. 13 of the written statement filed on behalf of this defendant. We do not think that the learned Subordinate Judge has correctly described the nature of the defence which was set up by these defendants-appellants. To deal first with the written statement of the defendant-appellant Muhammad Husain, we find in para. 11 of his written statement the following plea: "The answering defendant never took any loan from the father of the plaintiff nor did he ever execute any deed in his favour nor was there any necessity to execute such deed."

In para. 12 of the written statement to which the Subordinate Judge refers, Muhammad Husain does say that if his father (that is Mehdi Husain) ever got him to sign any deed by the exercise of undue influence then such execution is invalid and void. In para. 13 he went on to say that even if execution of any deed was proved the contract was void by reason of his being a minor at the time, that is to say, about 17 or 18 years old. With regard to the written statement put in by the defendant-appellant Ali Husain, we note that Ali Husain and his brother Hadi Husain filed a joint written statement. In para. 10 of that joint written statement the plea taken reads as follows: "The answering defendants never executed any mortgage deed in favour of the plaintiff or his father, nor have they ever taken

any loan." In para. 12 it is further stated that in the year 1902 when the deed in suit purports to have been executed, defendant 3, that is Ali Husain, was at the most 15 or 16 years old. In para. 13 Ali Husain did state that so far as he could recollect his father, defendant 1, took advantage of his tender age and got him to sign a paper. He went on to say that if the deed now before the Court was that paper, then it was not binding upon him because he received no consideration, and execution on his behalf was obtained by the execreise of undue influence upon him while he was stil of tender age. We are clearly of opinion that on these pleadings it must be taken that both the defendants-appellants did positively deny execution of the deed in suit; and even if it be taken that the pleadings as they stand leave any doubt in the matter, that doubt is removed by what took place in the proceedings in the Court below held before the issues were framed.

The record shows that the Subordinate Judge after reading the pleadings called upon the pleaders for the parties to make certain statements in connexion with the nature of their respective cases. The pleader who appeared on behalf of defendants 2, 3 and 4, Mr. Saiyed Ishaq Husain, stated definitely that he denied the execution of the mortgage deed in suit by defendants 2, 3 and 4. We have already referred to the staetments of these defendants- appellants as to their minority at the time when the mortgage deed in suit was executed and we may also state here that their pleader, the gentleman whose name we have just mentioned, also stated quite clearly before the Court that at the time when the deed in suit was executed defendant 2, that is, Muhammad Husain, was a minor. It being admitted that Ali Husain is younger than Muhammad Husain it follows that if it be found that Muhammad Husain was a minor at the date of the alleged execution his younger brother Ali Husain must also have been a minor. The first point which is raised in appeal before us is that the lower Court was wrong in holding that the execution of the mortgage deed by the two defendants-appellants had been proved. The first question therefore which we are called upon to decide is whether this ground is a valid one. The deed being a deed of mortgage is one which the law requires to be attested, and consequently under the provisions of S. 68, Evidence Act, execution of the deed must be proved by the evidence of at least one attesting witness. There is on record the evidence of three witnesses who swear to having attested the deed in suit. The first of these is one Har Prasad. In his examination-in-chief he stated that both the appellants, namely, Muhammad Husain and Ali Husain, signed the document in his presence. In cross-examination he admitted that he had refreshed his memory by looking at the deed before he went into the witness box, and he also admitted that but for seeing the document he would not have been able to say who signed the deed or whether in fact the appellants had signed it. However he does not appear to have modified the first statement he made to the effect that both these appellants did in fact execute the deed.

The second attesting witness is Ram Narayan. His recollection of the matter appears to be distinctly hazy. He says he cannot remember whether the executants signed in his presence or not. He was unable to say whether any of them had signed before or after him. He wound up by saying that the executants were Mehdi Husain and his sons, but he was unable to say which of the sons. The third attesting witness called was one Akbár Shah (P. W. 6). He began by saying that the deed was executed in his presence, that he attested it and signed his name after the executants had signed theirs. He qualified this statement then by saying that Mehdi Husain, Mahommad Husain and Ali Husain had signed it, but he could not remember exactly. He remembered that these persons were present at the time of registration. In cross-examination he summed up his recollection of the matter by saying that Mehdi Husain had asked him to get him money by way of loan, that in consequence he went to see Ramadhin, the uncle of Balbhaddar Singh, that finally this document was executed and that he signed it and it was registered. He concluded by saying that Mehdi Husain signed the deed in his presence, but that he could not remember about the signatures of the others. There is a curiously uncertain note about the evidence of all these at-

testing witnesses and particularly about the evidence of the two witnesses last named. It would seem that these persons were not very comfortable under cross-examination and if the evidence of execution consisted merely of the statements of these last two witnesses, we think that it could not possibly be held to be established beyond all reasonable doubt that the two defendants-appellants did, as a matter of fact, execute the deed.

However we must take it that Har Prasad, the first witness called in this connexion did adhere to his statement that the deed was executed by these appellants and we also note that defendant 1, Mehdi Husain who was examined as a witness, has sworn that he made the two appellants sign the deed although he goes on to say that they were both minors at the time. It is doubtful whether implicit reliance can be placed upon the statement of Mehdi Husain whose conduct throughout the whole of the transaction culminating in the mortgage now in suit is of a very suspicious character. But on the whole we are unable to say that the finding by the lower Court that the deed in suit was executed by these appellants is incorrect though we do not at all agree, as we have already said, with the Subordinate Judge when he states that execution by these defendants was admitted. We decide therefore that execution by the appellants was proved.

The next point for our decision is whether or not the appellants were minors on 23rd July 1902 when the deed in suit was executed. The finding of the Court below is that they were of age on the date in question. In this connexion the first point to be discussed is with reference to the burden of proof. Issue 2 as framed in the Court below reads as follows : "Whether defendants 2 and 3 were minors at the time of the execution of the mortgage-deed." According to the language in which this issue is framed it would appear that the Court below was of opinion that the burden of proving minority lay upon the defendants appellants: and it is argued in appeal here that this view of the Court below was incorrect. In support of this argument the learned counsel for the appellants relied upon the decision of the Allahabad High Court in the case of *Kanhaya Lal* v. *Girdhari Lal* (1). This ruling follows a previous ruling of the same Court, *Gaya Din* v. *Mt. Dulari* (2). According to these rulings the burden of proving that a contract was a valid contract when it was made, lies upon the plaintiff; and when in a suit upon a contract a plea of minority is raised by the defendant it is laid down that the burden of proving that the defendant was of age when the contract was entered into, lies upon the plaintiff who seeks to enforce the contract. On behalf of the respondents it has been contended that these rulings are wrong and should not be followed, but we are unable to accept this argument.

It is now well settled—even if it can be said that the matter was ever in doubt—that an agreement entered into by a minor is absolutely void and unenforceable at law. Before a plaintiff can ask a Court for any relief on the strength of a contract which he sets up, he must of necessity show that the agreement is a valid one which the law will enforce; and consequently if the validity of the agreement sued upon is denied by the defendant it is for the plaintiff to establish that the agreement is a binding contract. We have no doubt whatever therefore that in the present case it lay upon the plaintiff to establish affirmatively that the appellants were of age at the time when the deed was executed. Now so far as the plaintiff's evidence is concerned it is true that in their examination-in-chief his witnesses were not called upon to make any statement as to the ages of the two appellants at the time of execution; but they were cross-examined on the point and the statements made in cross-examination demonstrated in the clearest possible manner that these defendants-appellants must have been under age at the time when this mortgage-deed was executed. We would refer to the evidence of the plaintiff's witnesses on this point in detail. We have first the evidence of Har Prasad. It is apparent that Har Prasad knows Mehdi Husain and the members of his family. In his cross-examination he stated that Mehdi Husain had four sons and four daughters. The eldest of these he said was a daughter 26 or 27 years of age. Muhammad Husain he described as being

(1) [1912] 13 I. C. 956.
(2) [1909] 2 I. C. 839.

the eldest son and he stated positively that he was 24 or 25 years of age, that is to say, on 22nd April 1911, the date upon which the witness was being examined.

It follows from this that in 1902 Muhammad Husain could not have been more than 15 or 16 years of age. He was therefore according to this evidence a minor on that date, not being of the age of 18 years. The next witness to whose statement we would refer is that of Roshan Lal (P. W. 3) who was a mukhtear of Balbhaddar Singh and of the plaintiff. He states in his evidence that he has been a mukhtear in the Ramkot Estate for about 19 years and there can be no doubt that he knows Mehdi Husain and his family very well. In his cross-examination Roshan Lal stated that he knew the four sons of Mehdi Husain, that the youngest (that is, Hadi Husain) was 15 or 16 years of age, and that the next in age to him Ali Husain was 22 or 23 years of age. Roshan Lal's evidence was taken on 22nd April 1911 and it would therefore appear that Ali Husain in the year 1902 could only have been 13 or 14 years of age. Another witness in this connexion is P. W. 4, Amanatullah. This witness was called to prove the execution of a deed in 1899 by the defendant Muhammad Husain, the object being to make out that Muhammad Husain at that date was of full age. The deed in question is said to be a zamanatnamah or deed of surety which Muhammad Husain is said to have executed in order to secure the payment of the rent reserved by a lease which his father, Mehdi Husain, had taken from a talukdar. The original zamanatnamah was not produced in Court, though it would appear that some attempt had been made to call the original from the possession of one or other of the defendants. Amanatullah has sworn that he attested the original deed (zamanatnamah) of which Ex. 7 is a copy. The plaintiff relied upon this deed in proof of the age of Muhammad Husain. There is nothing however in the body of the document from which any inference can be made as to the age of Muhammad Husain on the date when he executed it.

From the endorsement made on this document at the time of registration it appears that Muhammad Husain described himself as being 20 years of age and much stress is laid upon this circumstance by the respondent's counsel. We do not think that any statement of this kind contained in an endorsement made by a registering officer can be put forward as proof of age, for under the provisions of the Registration Act there is nothing which authorizes a registering officer to put on record any note of the age of a person presenting a document for registration. It is true that under S. 35, Registration Act, a registering officer may refuse to register a deed if the person who claims to have executed it appears to him to be a minor. But there seems to be no authority for the proposition that a registering officer is obliged to make any record of the age of any person who appears before him. Apart from this the evidence of Amanatullah himself disposes completely of the case which the plaintiff attempted to set up on the strength of this endorsement. Amanatullah is on his showing a man who knows Mehdi Husain and his family very well. In cross-examination this witness stated that Muhammad Husain did, in fact, execute the deed in question. He described Muhammad Husain as being the eldest son of Chaudhri Mehdi Husain. He goes on to say that at the time when he was giving his evidence Muhammad Husain was about 25 or 26 yaars of age. That was on 22nd April 1911. He further stated that the deed was written 11 or 12 years ago. As we have already pointed out the deed purports to have been executed in 1899. The witness then stated definitely that when Muhammad Husain executed this deed he was only 13 or 14 years old. He says most positively that Muhammad Husain executed the deed under the orders of his father and that there was a dispute between the father and the son for about three days before the son consented to execute the deed. The witness also refers to Ali Husain, the other son whom he knows. He describes him as being 22 or 23 years of age. Amanatullah's statement therefore shows quite clearly that neither Muhammad Husain nor Ali Husain could have been of the full age of 18 years in 1902 when the deed in suit was executed.

As regards this zamanatnamah we may also point to the evidence of defendant 1, Mehdi Husain. Mehdi Husain states that he took several villages in

farm from a talukdar named Karim Bakhsh and that his son Muhammad Husain stood surety for him to secure the payment of the rent reserved by the talukdar. He says that he told Karim Bakhsh, the talukdar, that his son was a minor and that his security would be ineffectual. The evidence of the plaintiff's own witness Amanatullah, therefore is a very strong corroboration of this statement made by defendant 1 in the course of his examination and so far as this document is concerned, we hold that it affords no proof whatever that Muhammad Husain was of age in 1899. We may next refer to the evidence of the attesting witness, Akbar Shah (P. W. 6). This man in his cross-examination deposed that Mehdi Husain's eldest son was Muhammad Husain and that he was 25 or 26 years old. On this statement, therefore Muhammad Husain could not have been more than 17 years of age in 1902. Akbar Shah, it may also be noted, was an attesting witness to the zamanatnamah referred to in the evidence of the witness Amanatullah. He says that Muhammad Husain executed this zamanatnamah in favour of his (witness's) master. In re-examination he said that some one might have given Muhammad Husain's age as 20 years at the time when this deed was executed, that is to say, on 4th September 1899, but his statement in cross-examination proves quite clearly that Muhammad Husain could not have been of that age in 1899. From this review of the evidence offered by the plaintiff it is perfectly plain that the plaintiff cannot be said to have established positively that the two appellants were of full age when the deed was executed in the year 1902. The respondent's learned counsel however, as has already been noted, contended that even if the burden of proof lay upon him it was necessary for him to give only very slight evidence in order to shift the burden on to the defendant. He claimed in his argument that sufficient evidence had been given on his side in order to shift the burden on to the other side.

It cannot be contended as we have already pointed out that any statement made in the endorsements of registered deeds can be put forward as evidence to show that one or other of the appellants was of a particular age at the time of the registration of one or other of the deeds. It is argued however that the recitals contained in the mortgage deeds of 1900 and 1902 show that the defendants-appellants were of age at the time when the deed in suit was executed. We are not disposed to attach any great importance to the recitals in these two deeds one of which, viz., the deed in suit, is impeached by the defendants as being nothing short of a fraudulent transaction. It is true that in the first mortgage of 18th July 1900 Muhammad Husain is described as baligh. We are not prepared to allow that this statement creates any presumption in favour of the plaintiff's case which suffices to throw the burden of proof upon the other side. In the first place it is a most unusual circumstance in our experience for any party to a contract who is in fact of full age to be described as baligh. In the deed to which we are referring, the first executant, Saiyed Wazir Ali, the grandfather of the appellants, was no doubt of full age on the date on which this document was executed. He however is not described as baligh and it is not explained why in these circumstances it was considered necessary to set out that Muhammad Husain in particular was of full age. As for the document now in suit it would be absurd to attribute any weight to recitals contained in it which purport to show that both Muhammad Husain and Ali Husain were of full age on the date when it was executed. Here again we find the same curious circumstance. Mehdi Husain, one of the executants, who was undoubtedly of full age is not described as baligh and again no explanation is offered as to why Muhammad Husain and Ali Husain if they were really of full age on the date in question were described as being so by the addition of the expression "baligh." However after a careful consideration of the case we are of opinion that even if it be conceded that the burden of proof of minority lay upon the defendants-appellants it was fully discharged.

We have the evidence of Mehdi Husain himself who is the father of these appellants, and if we believe his story Muhammad Husain and Ali Husain, the appellants, were not of full age in 1902. He swears that in 1900 Muhammad Husain was only 14 or 15 years of age and that

in the same year Ali Husain's age was 10 or 11 years. Another witness of defendant 2 is Muhammad Sher Khan. This witness is a talukdar who pays Government revenue of Rs. 8,500 and is presumably a person of some position and character. It is true he is related to the appellants whom he describes as being his nephews, their mother being his sister. Muhammad Sher Khan states positively that Muhammad Husain is 25 or 26 years of age. This statement, it may be noted, fits in exactly with the statements made in cross-examination by the plaintiff's own witnesses. A third witness is Kudratullah, a zamindar who pays Rs. 800 Goverment revenue, and who knows Mehdi Husain and his family very well. He describes himself as being the maternal uncle of Muhammad Husain, and he deposes to having remembered the time when Muhammad Husain was born. He was able to fix the year of Muhammad Husain's birth, for he says that one year after the date of Muhammad Husain's birth there was the Queen's Jubilee.

The witness is obviously referring to the first Jubilee of 1887 and according to his evidence therefore it appears that Muhammad Husain must have been born somewhere about June 1886. Accordingly in 1902, when the deed in suit was executed, Muhammad Husain's age was only 16. Apart from this evidence, if the burden of proof is to be laid upon the defendants in this case, it can hardly be denied that in considering the question whether or not the burden of proof has been discharged, the defendants are entitled to have taken into consideration the statements which were elicited from the plaintiff's witnesses in their cross-examination. We have already pointed out that every witness for the plaintiff who professes to have any knowledge of the ages of the defendants-appellants made admissions which prove that in 1902 neither of them could have been of the full age of 18 years. These statements in cross-examination fit in exactly with the statements made by the defendants' own witnesses and taking the two together we consider we are justified in saying that assuming that the burden of proving minority lay in this case upon the defendants-appellants, that burden has been amply discharged by them. It was suggested in the course of argument on behalf of the respondents that if it were held in this Court that the Subordinate Judge had laid the burden of proving minority upon the wrong party, an opportunity should be afforded to the plaintiff to produce evidence to discharge the burden of proof if it properly lay upon him. We do not think that any suggestion of this kind can possibly be entertained at the present stage. The plaintiff-respondent cannot be heard to say that he has been put to any disadvantage or has in any way been taken by surprise in this matter. The question of minority was distinctly raised in the pleadings as also in the statement of the defendants' counsel which was made in Court previous to the framing of the issues. The plaintiff must have been well aware that these appellants were trying to escape liability by pleading minority, and although it may be said that the plaintiff did not directly offer any evidence as to the age of these defendants, it is nevertheless obvious that his witnesses in cross-examination made out the case which these defendants-appellants were seeking to prove. Again the plaintiff could not fail to be aware that the three witnesses who were examined for the defence also gave evidence to show that these two appellants were minors at the date of the mortgage in suit.

In these circumstances if the plaintiff was not content to abide by the evidence already given and if he had at his command any evidence which might have rebutted the statements already made, it was his duty to ask the Court for an opportunity to put that evidence before it. Nothing of this sort appears to have been done and the plaintiff cannot now take shelter under a plea that he was placed at a disadvantage by reason of the second issue in the case not having been cast in the proper form. In this connexion we may refer to a decision of their Lordships of the Privy Council reported as *Chandra Kunwar* v. *Chaudhari Narpat Singh* (3), a case which was referred to in the course of arguments by the respondents' learned counsel. In that case one of the matters in dispute was whether one of the plaintiffs, Raja Makund Singh, was or was not the adopted son

(3) [1907] 29 All. 184=11 C W. N. 321=4 A. L. J. 102=5 C. L. J. 115=17 M. L. J. 103=2 M. L. T. 109=9 Bom. L. R. 267. (P. C.).

of Raja Kishen Singh. The Court of first instance had held that he was the adopted son of Kishen Singh. On appeal the High Court reversed this decision and one of the questions before their Lordships of the Privy Council was as to whether or not the burden of proof in this matter of adoption had been properly allocated. On behalf of Makund Singh it was pleaded before their Lordships that the question of adoption had not been properly tried and that no specific issue had been framed on the point.

It was suggested therefore that if their Lordships were of opinion that the decision of the High Court was erroneous, the case should be remanded to allow of a decision on the question of adoption under an issue raised for that particular purpose. Their Lordships declined to accede to this suggestion on the ground that the plaintiff Makund Singh was well aware that the question of adoption would be raised and that documents had been put forward in the course of the trial, the only object of the production of which could have been to establish the fact of adoption. Notwithstanding therefore the fact that no specific issue on the question of adoption had been raised their Lordships declined to send the case back for further inquiry on this point; and similarly in the case now before us we are satisfied that it would be most improper now that the case has been through two Courts* to give the plaintiff any further opportunity of proving that the defendants-appellants were of age at the date when the contract in suit was entered into. As we have pointed out this matter was brought plainly to the plaintiff's notice in the pleadings and in the preliminary proceedings before the lower Court and he had every opportunity if he so chose to put forward any evidence which was available to him to prove that the appellants were of full age. We decline therefore to allow any further inquiry to take place on this point. Our finding is that the defendants-appellants were at the date of the execution of the mortgage deed in suit minors and that so far as they are concerned, the contract in suit is not binding upon them. This finding is sufficient to dispose of this appeal.

We allow the appeal and modify the decree of the Court below by declaring that the mortgage of 23rd July 1902 is not binding upon the defendants-appellants' shares in the property specified in the mortgage deed and that consequently so far as these defendants-appellants, are concerned the plaintiff's suit must be dismissed with costs. Respondent 1 will pay the costs of this appeal.

B.V./R.K. *Appeal allowed.*

*This decision being one on a first appeal the words "two Courts" appear to be simply a clerical mistake.—*Ed.*

A I. R. 1914 Oudh 52

PIGGOTT, J. C. AND LINDSAY, A. J. C.

Mir Syed Hasan and *another*—Plaintiffs—Appellants.

v,

Mt. Taiyaba Begam and *others*—Defendants—Respondents.

First Appeal No. 54 of 1911, Decided on 28th April 1913, from decree of Sub-Judge, Hardoi, D/- 31st October 1910.

(a) Evidence Act (1872), S. 101—Onus immaterial—Evidence recorded on clear issues — Question of misplacing burden of proof is immaterial in appeal — Pleadings can be treated as evidence.

Where a suit has gone to trial upon clear and specific issues, in respect of which evidence has been produced by both parties, a Court ought not to pay much heed to the arguments as to the allocation of the burden of proof, or the precise point at which such burden of proof may be said to have shifted to one side or the other in consequence of particular pleadings or admissions or particular items of evidence, but should prefer as a rule simply to consider the evidence as a whole, treating the pleadings of the parties as pieces of evidence relevant under the head of admissions, and endeavouring if possible to arrive at a clear finding upon the questions of fact involved. [P 56 C 2]

(b) Practice — Parties—Defendant joined at his instance—Plaintiff objecting—Plaintiff's appeal dismissed — Evidence of both parties recorded—In appeal plaintiff contending, on different grounds, that defendants should not have been joined and their names and pleadings should be expunged—Prayer was rejected.

On certain persons applying to be added as defendants in a case the Court of first instance, in spite of the plaintiffs' protest, ordered them to be so added. The plaintiffs did not reserve it as a matter which might be called in question, if necessary, later on in appeal from any decree which might be passed in the case, but at once appealed from that order, which even the appellate Court upheld. These additional defendants were thus brought on the record, entered their pleadings, putting the plaintiffs to proof of their entire case, cross-examined the plaintiffs' witnesses, and tendered evidence of their own. The Court of first instance passed a decree in the case against the plain-

tiffs, and they again contended on appeal from that decree, on certain new allegations not brought home to the appellate Court in the previous appeal from the said order, that the present additional defendants ought never to have been brought upon the record, and that not only their pleadings but also the evidence led by them ought to be ignored and excluded from consideration :

Held: that the additional defendants could not be struck off the record at that stage and that their pleadings and the evidence led by them could not be expunged from the record or ignored in arriving at a decision on the facts. [P 58 C 2]

(c) Practice — Relief — Decree on admission by some defendants cannot be granted if relief not divisible and plaintiff's claim is not proved as against contesting defendants.

Where there are two sets of defendants and one of those sets admits and the other denies the plaintiffs' claim, and the case is such that no separate reliefs can be granted against each set, the plaintiffs cannot get a decree as against the defendants admitting their claim if they fail to establish their case, which they are bound to prove owing to the pleadings of the other defendants denying their claim.

(d) Civil P. C. (1908), O. 6, R. 5 — Object of, explained—Vague pleadings should be asked to be made specific.

The sole object of every system of pleadings is that each side may be fully alive to the questions that are about to be argued, in order that they may have an opportunity of bringing forward such evidence as may be appropriate to the issues: 22 *Cal.* 324, *Ref.*

Where the pleadings of a party are vague and unsatisfactory, a Court ought to endeavour to have them clearly specified as far as possible.

(e) Succession Act (10 of 1865), S. 50—Will attested after ten years of execution on admission, satisfies requirements of S. 50—Before attestation will held not legal—Place of signature not fixed—Execution and registration held effacted on same day.

A will, after having been executed but without having been signed by any attesting witness was deposited in a sealed cover at the office of the Sub-Registrar. About ten years later the executant went to the Sub-Registrar's office, took out the will from the sealed cover and formally presented it for registration as a will and admitted its execution in the presence of attesting witnesses, and these witnesses as well as the executant himself signed the document in the proper places :

Held : (Per *Piggott, J. C.*), that the above proceedings amounted to an attestation of the will sufficient to satisfy the requirements of S. 50: 11 *Cal.* 429 and 27 *Cal.* 169, *Ref.* [P 60 C 2]

Held further: (Per *Piggott, J. C.*), that the execution of the will was not legally complete before the time when it became valid in law in consequence of its attestation by the Sub-Registrar and by the identifying witnesses.

Held also: (Per *Piggott, J. C.*), that as there is no law as to the precise place on a document where the executant must affix his signature in order that his act in so doing may amount to an execution, the will in question could be said to have been executad and registered on one and the same day. [P 61 C 1]

Held lastly : (Per *Lindsay, A. J. C.*), that as the execution of a will included both the signature of and acknowledgment by the testator and the attestation of the subscribing witnesses, the will in question could not be said to have been executed until it was attested by the marginal witnesses : 3 *M. I. A.* 395 (*P. C.*), *Ref.*

(f) Will — Revocation — Adoption of son does not ipso facto revoke will.

The adoption of a son does not in itself operate to revoke or nullify a valid will executed by the adoptive father in favour of his wife, any more than the birth of a natural son does. [P 60 C 2]

(g) Will — Revocation to be valid and operative by fresh bequest it must be in clear and unambiguous terms conferring title.

A document purported to constitute a person the *janashin wa quim-muqam* (representative or 'locum tenens') of the executant and provided that "*hamesha bad mere tamam umur talukdari ka anjam deta rahega*" (after the executant's death the person will always attend to or perform all the duties appertaining to talukdar), and that he should represent the executant in the presence of officials, members of the brotherhood, tenants of the estate and others, and on official occasions such as Durbars held by the Lieutenant-Governor and the like. It was contended that these words and expressions considered together might reasonably be interpreted as being of a testamentary character and as implying a bequest of the talukdari estate in that person's favour and thus revoking a will previously in existence :

Held : that, inasmuch as a revocation in order to be valid and operative as a fresh bequest must be in clear and unambiguous terms, and as words to the effect that the person named in the document in question was merely to be the 'janashin' or 'locum tenens,' the document could not, in the absence of a clear and positive bequest of the estate in his favour., be interpreted as a will conferring the taluka upon him and to divest the legatee of such estate in whose favour the will had previously been made. [P 61 C 2]

(h) Evidence Act (1 of 1872), Ss. 102 and 103—Nature of burden of proof upon person putting forth document alleged te be revoking a will stated—He must prove not only execution but testamentary capacity of the executor.

The plaintiffs put forward a document which they contended had the effect of setting aside the will in favour of the defendant:

Held : that the burden of proof to be laid upon the plaintiffs should be, just the same as legally lies upon the propounders of a will, and more particularly upon the propounders of a will which has the effect of revoking a will previously in existence, and that once any circumstances are shown to exist which may reasonably excite proper and well-grounded suspicion in the mind of the Court, a person claiming under such a document is bound to satisfy the Court, not only as to its meehancial execution, but also as to the fact that the executant

fully understood the nature and the terms of the deed : 3 *I.C.* 799 (*P. C.*) and 27 *Cal.* 521 (*P. C.*), *Ref.* [P 62 C 2]

(i) Practice —Pleadings—Party trying to prove point not specifically alleged—Rebutting evidence must be allowed.

A party endeavouring to establish a point not specifically stated in his pleadings cannot object to the opposite party's tendering rebutting evidence as regards that point.

(j) Practice — Evidence—Question about happening of event in cross-examination does not impute assertion of that event.

If a party's counsel simply asks a witness in cross-examination as to whether a certain event happened, it cannot be said that that party commits himself to the assertion that such an event actually took place. [P 69 C 1]

(k) Evidence Act (1 of 1872), Ss. 34 and 39—Evidence of statements made by deceased about execution of will is admissible.

In cases of disputed wills or other dispositions of property. evidence as to statements alleged to have been made by the deceased testator or executant, from which inferences can be drawn as to the execution or otherwise of the documents in dispute or as to the circumstances under which such execution was obtained, is admissible. [P 72 C 1, 2]

(l) Evidence Act (1 of 1872), Ss. 11, 18, 19 and 21—Evidence of conduct and statement about deed of adoption, of which deceased is alleged to have become aware after execution, and before death is perfectly relevant.

Where in a case of a disputed deed of adoption the defendant alleged that the deceased executant had become shortly after the execution of the deed aware of its existence, purport and effect, and after having become so aware had taken steps to cancel it or to nullify its effect, the conduct of the executant from the moment that he became admittedly aware of the existence, purport and effect of the deed is not merely a relevant fact, but a very important fact in the case; and the evidence offered by the defendant as to statements made by the executant in the interval of the execution of the deed and his death expressing the view taken by him of the deed after he had known of its existence, or the action which he had conceived himself to have taken regarding it, cannot be excluded as irrelevant, but is admissible under the head of admissions under Ss. 18, 19 and 21 or S. 11, Evidence Act. [P 72 C 2]

(m) Evidence Act (1 of 1872), S. 92—Oral evidence contradicting registered document should not be allowed unless truth of execution is suspected.

It is a dangerous thing to admit oral evidence as to statements alleged to have been made by a deceased executant as having the effect of practically cancelling a registered document, unless there are anomalous and suspicious circumstances already in existence. [P 73 C 2]

(n) Evidence Act (1 of 1872), Ss. 18 and 19—Admissions against interest are conclusive unless circumstances exist discounting value of admissions.

In ordinary cases the admissions made by a party against his own interest might well be regarded as decisive against him. But in special cases where there exist a variety of circumstances calculated to discount the value of such admissions, those admissions may well be ignored from consideration as being of no effect.

(o) Registration Act (16 of 1908), S. 49—Unregistered deed is admissible to prove executant's state of mind.

An unregistered document, although inoperative as a deed of transfer of property or the likes, can be looked at for a collateral purpose, for instance, to ascertain the executant's state of mind on or about the time that the document was executed.

Wazir Hasan and *Shahinshah Hussin* —for Appellants.

Sri Ram Bahadur, *Gokaran Nath Misra*, *Ramapat Ram* and *Ali Abbas* and *Muhammad Siddique* —for Respondents.

Piggott, J.C.—This was a suit for possession of an estate known as taluka Waira Kazi in the Bahraich District. This estate was granted by the British Government to Mir Muzaffar Husain, whose name was entered at No. 160 in List 1 and No. 63 in List 3 of the lists of talukdars and grantees prepared under the provisions of the Oudh Estates Act (1 of 1869). It was transferred by him in the year 1874, by a deed of gift inter vivos duly registered according to law, to his only son Mir Kazim Hussan. The latter died without issue on 12th May 1894, and his death was immediately followed by a dispute as to the succession to the estate, in which there were at least four distinct parties. One was Mt. Taiyaba Begam, the widow of Mir Kazim Husain; another was Mir Saiyid Ali, the son of one Saiyid Muhammad, a resident of the Agra District, by his marriage with Mt. Sughra Begam, a sister of Mt. Taiyaba Begam abovementioned. Mir Saiyid Ali claimed the estate as the adopted son of Mir Kazim Hussain and set up a deed of adoption dated 9th November 1893, and purporting to have been duly registered on 14th November 1893. A third claimant was Saiyid Muhammad Hasan whose mother was an own sister of Mir Kazim Husain. The fourth claimant was Karamat Husain, the son of an own brother of Mir Muzaffar Husain, the first holder of the taluka. As a matter of fact, Mir Muzaffar Husain had two brothers each of whom left a son, but the estate is one which must descend to a single heir, and the actual claimant appears to have been Karamat Husain as above stated. Under circumstances which

I propose to consider more in detail later on, the possession of the estate actually passed into the hands of Mt. Taiyaba Begam and has continued in her hands ever since. Mir Saiyid Ali himself died on 1st September 1901, leaving him surviving a brother, Mir Saiyid Hasan.

On 24th April 1906, the said Mir Saiyid Hasan executed a deed of sale by which he purported to transfer one-half share in the Waira Kazi estate to two persons, Saiyid Muhammad Mehdi Hasan, a resident of Lucknow, and Nawab Ali Khan, a resident of Amroha in the Moradabad District. This deed was registered on the following day, that is to say on 25th April 1906, and its avowed purpose was to obtain funds by which Mir Saiyid Hasan might prosecute his claim to recover the Waira Kazi estate from the possession of Mt. Taiyaba Begam. The present suit was instituted on 11th May 1906, the original plaintiffs being Mir Saiyid Hasan, Saiyid Muhammad Mehdi-Hasan and Nawab Ali Khan abovementioned. Nawab Ali Khan has since transferred his rights to Saiyid Muhammad Mehdi Hasan, so that the appeal now before us is being prosecuted by Mir Saiyid Hasan, as the alleged rightful heir to the estate on the death of Mir Saiyid Ali, and by Saiyid Muhammad Mehdi Hasan as a speculative purchaser of a half share in the estate on the chance of the other plaintiff being able to make good his claim. The respondents before us are Mt. Taiyaba Began, the lady in actual possession of the estate, and Saiyid Muhammad Hasan and his sister, Mt. Askari Begam, whose presence on the record has been the subject matter of much controversy.

I have already explained that this Saiyid Muhammad Hasan is the son of an own sister of Mir Kazim Husain. Shortly before the present suit was instituted, another suit had been brought by Saiyid Muhammad Hasan and Mt. Askari Begam in respect of a single item of property, namely, a share in a village called Basahiya Patti, which appears as item No. 3 in the list of the properties forming the Waira Kazi estate appended to the plaint in the present suit. Saiyid Muhammad Hasan and his sister alleged that this share in village Basahiya Patti was non-talukdari property and they claimed a portion of the same as heirs of Mir Kazim Hussain under the ordinary Mahomedan law. They asked that the plaintiffs in the suit now before us should be added as defendants in the suit brought by them for village Basahiya Patti and that they themselves might be added as defendants in the suit now under appeal. This was strongly opposed by the present plaintiffs-appellants, whose position has throughout been that the present suit ought to be fought out as between themselves and Mt. Taiyaba Begam only. They sought to strengthen their position on this point by formally abandoning their claim to the property in village Basahiya Patti, which small item has accordingly been struck out from the list of the property now in suit. Nevertheless the learned Judge the Court below granted the application of Saiyid Muhammad Hasan and Mt. Askari Begam as regards both the pending suits, and his order to this effect dated 3rd September 1906, was at once appealed to this Court by Mir Saiyid Hasan and his co-plaintiff and made the subject matter of the two connected Miscellaneous Appeals Nos. 80 and 83 of 1906, disposed of by this Court under an order dated 12th November 1906. The effect of that order was to reverse the decision of the Court below as regards the array of parties in the small suit for the property in village Basahiya Patti, but to affirm that decision as regards the main suit for possession of the taluka. The present suit has therefore been fought by the plaintiffs an against the original defendant Mt. Taiyaba Begam and the two defendants, Saiyid Muhammad Hasan and Mt. Askari Begam, who were added as such on their own application.

The suit was litigated at enormous length in the Court below and was not decided till 31st October 1910, when the learned Subordinate Judge produced an elaborate judgment dealing at length with the 36 issues fixed by him on the pleadings, but finally dismissing the plaintiffs' suit upon a clear finding of fact, namely, that the plaintiffs had failed to prove the execution by Mir Kazim Husain of the alleged deed of adoption in favour of Mir Saiyid Ali, or that Mir Saiyid Ali was in fact the adopted son of Mir Kazim Husain or had succeeded to the Waira Kazi estate on the death of

the latter. The learned Judge of the Court below has taken infinite pains over the trial of this suit, but he does not seem to me to have exercised that sort of control over the proceedings which it is desirable that Courts of Justice should exercise in the interests of the litigants themselves as well as in those of the administration of justice generally. The suit seems to me in fact a bad example of a sort of abuse which has come under my notice on one or two occasions, namely, the practice in this Province of Oudh of fighting out suits in which valuable property, and more especially talukdari property, is involved at preposterous length and with an utter disregard of all considerations of time and expense. A number of side issues were allowed to be raised and to be debated at a length altogether out of proportion to their real bearing on the result of the suit ; and the right of cross-examination was exercised in the case of some of the witnesses at a length which I can only characterise as an abuse of the procedure of the Court. The result is that it is no easy matter at this stage to disentangle the essential points of the case from the mass of superfluous or irrelevant matter with which they have been overlaid, and that the attention of the Court below was so far distracted from these essentials that on more than one occasion a witness was allowed to leave the box after a lengthy examination without certain questions having been put to him which now appear to have been really necessary and important.

The plaintiff, Mir Saiyid Hasan, has obviously no claim to the Waira Kazi estate as heir of Mir Kazim Husain, his relationship to the latter being limited to the fact that he is a son of a sister of Mt. Taiyaba Begam, widow of Mir Kazim Husain. In order to make out his case, the plaintiff has to satisfy the Court that the property in dispute passed from Mir Kazim Husain to Mir Saiyid Ali and that the latter was in law the rightful owner of the Waira Kazi estate from the death of Mir Kazim Husain on 12th May 1894 to his own death on 1st September 1901. It is not denied that Mir Kazim Husain had a right, subject to the provisions of the Oudh Estates Act (1 of 1869), to bequeath the property in dispute by will, or by adopting a son to bring such adopted son on to the list of heirs in case of intestacy set forth in S. 22 of the same Act. The case for the plaintiffs is that Mir Kazim Husain did adopt the late Mir Saiyid Ali by a writing executed and attested and duly registered in the manner required by law. This writing is the deed of adoption, Ex. 1 on the file, dated 9th November 1893, and purporting to have been registered on 14th November 1893. Before the plaintiffs' suit can be decreed, the Court must be prepared to hold that this document is the act and deed of Mir Kazim Husain and was registered in accordance with law. The Court below has not only held this not to be proved, but has gone a good deal further, holding in effect that the deed is a forgery and that its registration was brought about by bribing a corrupt Sub-Registrar. One of the main contentions urged upon us in appeal on behalf of the plaintiffs is that no such finding as the above is really open to the Court on the pleadings, that the execution of the document, Ex. 1, by Mir Kazim Husain should be regarded as an admitted fact and that the only questions really in issue are questions of fraud, coercion or undue influence, the burden of establishing which should be laid upon the defendants.

Where a suit has gone to trial upon clear and specific issues, in respect of which evidence has been produced by both parties, I am ordinarily disposed to be somewhat impatient with regard to arguments as to the allocation of the burden of proof, or the precise point at which such burden of proof may be said to have shifted to one side or the other in consequence of particular pleadings or admissions or particular items of evidence. I should prefer as a rule simply to consider the evidence as a whole, treating the pleadings of the parties as pieces of evidence relevant under the head of admissions, and endeavouring if possible to arrive at a clear finding upon the questions of fact involved. I must however deal with the question of the pleadings in the present case at some little length, because it seems to me a very important, if not a vital, part of the appellants' case. There are two distinct questions involved, namely, the pleadings of Mt. Taiyaba Begam, the original defendant in the case, and the position of defendants 2 and 3, who were

brought on the record by order of the Court. It is not denied that the pleadings of the latter simply put the plaintiff to proof of his entire case, including the execution of the deed of adoption, Ex. 1 as well as its registration and its validity in law. The appellants do not deny this, but it is contended on their behalf that Saiyid Muhammad Hasan and Mt. Askari Begam have no possible claim in law either to the present possession of the Waira Kazi estate or to succession to the same hereafter, that they ought never to have been brought upon the record of the case and that, not only their pleadings but the evidence led by them, ought to be ignored and excluded from consideration. The case for these defendants is that Mt. Taiyaba Begam is at present in possession of the Waira Kazi estate merely as the widow of the deceased talukdar for her lifetime only, under Cl. 7, S. 22, Act 1 of 1869, and that after her death the estate must go to such persons as would have been entitled to succeed to the same under the ordinary law in accordance with the provisions of Cl. 11 of the same section. The parties to this suit are Muhammadans of the Shia sect, and Saiyid Muhammad Hasan and Mt. Askari Begam claim that they would be the next heirs of Mir Kazim Husain under this law after the death of his widow, they being the son and daughter of an own sister of Mir Kazim Husain.

In the course of argument before us it was conceded that the estate must go to a single heir and that Mt. Askari Begam could have no claim, at any rate in the lifetime of her brother, Saiyid Muhammad Hasan, but it was still contended that Saiyid Muhammad Hasan would be entitled to the estate on the death of Mt. Taiyaba Begam in the event of his surviving her, and that he was rightly brought on the record in order to enable him to defend his reversionary interests. Against this the case for the plaintiffs-appellants is twofold. They contend that the Court below has itself found that Mt. Taiyaba Begam is not in possession of the Waira Kazi estate as the widow of a talukdar under S. 22, Cl. 7, Oudh Estates Act (1 of 1869), but as a legatee under a will registered on 15th January 1887, which, though it may not be valid as against an adopted son (in case the adoption of Mir Saiyid Ali is proved), would certainly be valid as against the children of Mir Kazim Husain's sister. Obviously, if Mt. Taiyaba Begam is in possession of the Waira Kazi estate, not as heir under an intestacy but as legatee under a valid will, her title would be an absolute one not limited to her life only, and whatever might be the devolution of the estate after her death the surviving relations of her late husband could have no present interest in the estate, such as was put forward by Saiyid Muhammed Hasan and his sister when they asked to be brought on this record as defendants. In the second place, it is argued on behalf of the appellants that, if Mir Kazim Husain died intestate and without having adopted Mir Saiyid Ali, his estate would descend as an impartible estate according to the rule of primogeniture as understood in the law of England. If so, the rightful heir after the death of Mt. Taiyaba Begam would have to be sought by ascending to Mir Kazim Husain's father and searching amongst the descendants of the latter in the male line. It is suggested that that heir would at this moment be Karamat Husain, the son of a brother of Mir Muzaffar Husain, who was one of the claimants to the estate on the death of Mir Kazim Husain, but is no party to the present suit. Authority for this proposition is sought in the decision of their Lordships of the Privy Council in *Debi Bakhsh Singh* v. *Chandrabhan Singh* (1), and apart from this it is contended that the question is placed beyond doubt by the amendments effected in the Oudh Estates Act by the new Act (3 of 1910). This latter contention raises a further question whether the defendant, Saiyid Muhammed Hasan, could be said to have acquired a vested interest in this Waira Kazi estate before the amending Act came into force; while, as regards the Privy Council ruling above referred to, we were asked to consider the remarks of their Lordships with reference to the particular facts of that case and to the old ruling in the case of *Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (2), which was at any rate not dissented from in the later case. It seems to me unnecessary to decide the intricate questions of law thus raised, and altogether inexpe-

(1) [1910] 32 All. 599 = 7 I. C. 724= 37 I. A. 168=13 O. C. 316 (P.C.).
(2) [1878] 1 C. L. R. 318=5 I. A. 1 (P.C.).

dient to pronounce any opinion concerning them in the present case. When the Court of first instance brought Saiyid Muhammed Hasan on the record as a defendant, the plaintiffs did not elect to submit to that order and to reserve it as a matter which might be called in question, if necessary, later on in appeal from any decree which might be passed in the case. They exercised their right of appeal under S. 588, Cl. 2 of the former Civil P. C., and brought the question at once before this Court. At the hearing of that appeal it is obvious that the plaintiffs did not raise any of the questions now argued before us. They did not plead a will in favour of Mt. Taiyaba Begam as putting Saiyid Muhammed Hasan out of Court, because they were at that time denying altogether both the execution and the validity of the will registered on 15th January 1887. This Court was entitled to treat it as an admitted fact, as between the plaintiffs on the one hand and Saiyid Muhammed Hasan on the other, that Mt. Taiyaba Begam's possession was either that of a trespasser without any valid title, or that of the widow of a talukdar who had succeeded under the provisions of S. 22, Cl. 7, Oudh Estates Act (1 of 1869) and was in no case that of the legatee of a talukdar.

The order passed by this Court on 12th November 1906 shows that the case was so regarded. It shows further that no question as to the possible rights of Karamat Husain was raised at that time before this Court, but that it was accepted as an admitted fact that, if Mt. Taiyaba Begam was lawfully in possession for her life-time under S. 22, Cl. 7, aforesaid, then Saiyid Muhammed Hasan would be the eventual heir under Cl. 11 of the same section. This Court was asked to consider only whether or not under such circumstances Saiyid Muhammed Hasan would be a proper defendant in the case, and this point was decided in his favour and against the plaintiffs. There must be some finality about the decision of a Court on such a point, so far at least as that same Court is concerned. I do not see that we are bound to re-consider the propriety of the order passed by our predecessors on 12th November 1906 or that it would be in any way expedient to do so. The fact remains that these defendants have been brought on to the record, have entered their pleadings, have cross-examined the witnesses for the plaintiffs and have tendered evidence of their own. I am clearly of opinion that these matters cannot now be expunged from the record or ignored in arriving at a decision on the facts. Suppose the defendants who were added in accordance with this Court's order had been in a position to produce evidence which satisfied us beyond possibility of doubt that the document Ex. 1, was a forgery and that any admissions to the contrary made by Mt. Taiyaba Begam were collusive and obtained from her by improper means, could it be seriously contended that we should be bound nevertheless to decree this suit in favour of the plaintiffs because we thought our learned predecessors had made a mistake in bringing Saiyid Muhammad Hasan on to the record? I thought it right to go into this point carefully but as a matter of fact my view of the case as a whole would not be seriously affected if I had to consider the evidence on the record with reference only to the pleadings of defendant 1, Mt. Taiyaba Begam. The paragraph of the plaint in which Saiyid Ali's adoption and the execution of the deed, Ex. 1, were set up as the foundation of the plaintiffs' case was para 2. To this Mt. Taiyaba Begam's reply was she admitted the fact of Mir Kazim Husain's death without issue and the blood relationship between the plaintiff Mir Saiyid Hasan and the late Mir Saiyid Ali. She then continued: "The rest of the allegations of this paragraph are not admitted, subject to additional pleas." What those additional pleas were, I find set forth in paras 14, 15, 16 and 17 of the same written statement. It was expressly denied that there had ever been any "valid and lawful adoption" of Mir Saiyid Ali, or that Mir Saiyid Ali ever acquired any good title in law to the Waira Kazi estate. As regards the document Ex. 1, the defence set up was threefold:

(1) That it "was written contrary to the intention of Mir Kazim Husain, at a time when he was in consequence of illness unable to understand the nature and effect of the document."

(2) That it was subsequently cancelled by Mir Kazim Husain and its cancella-

tion was accepted and ratified by Mir Saiyid Ali himself.

(3) That in any case this document could not have the effect of superseding the will in favour of Mt. Taiyaba Begam duly registered on 15th January 1887.

The pleading as regards the factum of execution was obviously vague and unsatisfactory. The plaintiffs in their replication were quick to seize upon it as an implied admission of execution and challenged defendant 1 to specify more clearly the grounds upon which she alleged the document to be invalid. The result of this was that, in a later proceeding of 5th February 1907, the learned counsel who represented Mt. Taiyaba Begam made a statement to the following effect:

"That the execution of the said deed of adoption dated 9th November 1903, in favour of Saiyid Ali is not denied by defendant 1, but it is denied that it is valid and subsisting under the law in force in British India."

It is to be observed at the same time that immediately after this the documentary evidence tendered by the plaintiffs was gone through, and the document Ex. 1, was endorsed as denied, without any qualification or any note being made as to there being any difference of pleading on this point between the two sets of defendants. Even as the case then stood, the pleadings of defendant 1 were not in my opinion, sufficiently clear or specific and it would have been as well if the Court had taken up this point at once and pressed for a clear explanation as to what was intended by this admission of execution and how this admission was to be reconciled with the original plea that the document was contrary to the purpose or intention (khilaf mansha) of Mir Kasim Husain. As it was, the point came up again for consideration on 14th March 1897, and there can be no doubt that defendant 1 then shifted her ground and did so in a somewhat disingenuous fashion. It was then stated on her behalf that the words "khilaf mansha" in the original written statement were intended to mean that the document was executed without the knowledge of Mir Kazim Husain, This does not appear to be a reasonable translation of the vernacular expression, and in any case defendant 1 might well have been pressed to enter some precise and specific pleadings as regards every portion of the document, Ex. 1, which purports to bear any writing by the pen of Mir Kazim Husain himself. The Court however accepted the pleadings as they stood and actually framed amended issues on 14th March 1907, on the strength partly of this new pleading as to the meaning of the words "khilaf mansha." On a review of these pleadings as a whole, confused and defective as I think them, it seems to me that the utmost that can be said is that Mt. Taiyaba Begam admitted that Mir Kazim Husain had actually appended his signature to the document, Ex. 1, but pleaded that he did so without being aware of the nature, contents or effect of the said document. She was never asked to enter any specific pleadings as to the registration of the document, or as to the signatures which purport to be those of Mir Kazim Husain appearing at the foot of the registration endorsements on the back of the document. Considering, however that those endorsements include express statements to the effect that the document was tendered for registration by Mir Kazim Husain at his own house at Jarwal and execution of the same admitted by him in the presence of the Sub-Registrar, who was personally acquainted with the executant, the plea that the document was written contrary to the intention of Mir Kazim Husain, and the further plea that it was written or executed without his knowledge, necessarily involved a plea that fraud of some sort or other had been committad in connexion with the registration of the document as well as in connexion with its execution.

I think it advisable to pause at this point to consider the position of the parties with regard to the will in favour of Mt. Taiyaba Begam, because the existence of this document has, in my opinion, a considerable bearing, not only on the general probabilities of the case as affecting the credibility of the oral evidence, but also on the question of the pleadings, when the Court comes to estimate the nature of the burden of proof to be laid on the plaintiffs in respect of their document, Ex. 1. On the original pleadings the plaintiffs denied both the execution and the validity of the will in favour of the defendant 1.

The evidence as to execution is necessarily scanty, there being no witness now alive to give direct evidence on the point. There can be no doubt however that the document before the Court purporting to be the will of Mir Kazim Husain in favour of Mt. Taiyaba Begam was executed by him and was duly registered; this point was finally conceded and taken for granted in the arguments addressed to us on behalf of all the parties concerned. I find then that on 12th May 1877, within three years of his coming into possession of the Waira Kazi estate, Mir Kazim Husain, being then about 45 years of age, executed this will in favour of his wife, Mt. Taiyaba Begam, then a young woman of 17 and deposited it in a sealed cover at the office of the Sub-Registrar of Lucknow. The will as thus executed had not been signed by any attesting witness.

More than 9 years later the fact that an unattested will thus deposited would not satisfy the requirements of the law, must have been brought to the notice of the testator and we find that on 15th January 1887 Mir Kazim Husain went to the Sub-Registrar's Office at Lucknow, took out the will in question from the sealed cover and formally presented it for registration. It is perhaps worth noticing that the document as it now stands, not only bears Mir Kazim Husain's signature in the margin at the place where the executant would naturally sign it, but that his signature appears in three places in the body of the deed as attesting erasures or corrections. This fact was noted by the Sub-Registrar in his endorsement; it is not clear whether that official caused these additional signatures to be made when the will was tendered to him for formal registration, but there seems to me distinct probability that this is what actually occurred. In any case Mir Kazim Husain presented the document to the Sub-Registrar for registration as a will and admitted its execution in the presence of three attesting witnesses and these witnesses, as well as Mir Kazim Husain himself, proceeded to sign the document on the back in the proper places below the registration endorsements. According to the view repeatedly expressed by various Judges of the Calcutta High Court, as for instance in *Nitya Gopal Sircar* v. *Nagendra Nath Mitter Mozumdar* (3) and *Amarendra Nath Chatterjee* v. *Kashi Nath Chatterjee* (4), these proceedings amounted to an attestation of the will sufficient to satisfy the requirements of S. 50, Succession Act, 10 of 1865. This view seems to me both good law and good sense, as there cannot be the shadow of a doubt regarding the purpose and intention of Mir Kazim Husain in thus getting the will registered. He deliberately re-affirmed after an interval of more than 9 1/2 years his intention of making Mt. Taiyaba Begam, his legatee. If he did not copy out the will on to a fresh piece of paper and sign it over again in the presence of the Sub-Registrar and the identifying witnesses, the only possible reason for this was that he did not think it necessary to take the trouble to do so. He undoubtedly signed the paper in two places on the back at the foot of the registration endorsement in the presence of the Sub-Registrar and of the attesting witnesses, and I think it highly probable that he also signed it in three places on the face of the deed at the instance of the Sub-Registrar, where that official noticed certain corrections or alterations in the deed. I say that this is probable, because the corrections or alterations in question have the appearance of being more rectifications of an original slip of the pen, and I think it unlikely that the idea of attesting them with his signature would have presented itself to Mir Kazim Husain's mind unless his attention was drawn to it by the Sub-Registrar at the time of its formal registration.

We thus have in favour of Mt. Taiyaba Begam a will executed, attested and registered as required by law more than three months before the death of the testator, and therefore valid against all the world except for one possible objection to be considered presently Now it seems to me beyond doubt that the subsequent adoption of Mir Saiyid Ali, if such adoption in fact took place would not in itself operate to revoke or nullify a valid will, any more than the birth of a natural son would have done. The contention for the plaintiffs however, a contention which has found favour in Court below, is that if the factum of adoption were held to be proved in res-

(3) [1885] 11 Cal. 429.
(4) [1900] 27 Cal. 169.

pect of Mir Saiyid Ali, then this will would ipso facto become inoperative, because it was not registered within one month from the date of its execution. In the second place, it was further contended before us that the deed, Ex. 1, contains words and expressions which give it the effect of a testamentary disposition in Mir Saiyid Ali's favour; so that, even though the mere execution of a deed of adoption should he held not to have the effect of nullifying the will, yet the particular document before us is so worded that it has that effect. A question of law is thus raised which strikes at the very root of the plaintiffs' case. If it be decided against them, the great bulk of the record now before us becomes superfluous, and the issues raised regarding the execution and validity of the deed, Ex. 1, also become superfluous.

I do not propose to decide the case on this point alone, because after all that has taken place in the course of this litigation it seems to me very desirable that this Court should, if possible, come to some definite finding on the issues of fact which have been litigated at such enormous length. I am bound to say however that the more I have considered the point, the less disposed I feel to accept the position taken up by the learned Judge of the Court below as to the practical cancellation of the will by the adoption deed, Ex. 1, if the execution and validity of the latter should be affirmed. It seems to me that the execution of the will was not legally complete before 15th January 1887, when it became valid in law in consequence of its attestation by the Sub-Registrar and by the identifying witnesses. There is, moreover, no law as to the precise place on a document where the executant must affix his signature in order that his act in so doing may amount to an execution and I do not see why the signatures of Mir Kazim Husain to the registration endorsement and his signatures to the corrections on the face of the document (supposing I am right in my belief that these latter were affixed on 15th January 1887) should not be treated as a re-execution, or as the first valid execution of the document by the act of signing the same in the presence of attesting witnesses. From either of these points of view it would seem that the will was executed on 15th January 1887 and was therefore registered on the very day of its execution. I have felt more difficulty regarding the arguments addressed to us on behalf of the appellants regarding the actual wording of the deed, Ex. 1. That document purports to constitute Mir Saiyid Ali, not merely the adopted son but also, the "*janashin o qaim muqam*" of the executant.

Now each of these words may be translated either a "representative" or "locum tenens" or a "successor," so that there is a certain ambiguity involved in the expressions while a few lines further occur the words "*aur hamesha bad mere tamam umur talukdari ke anjam deta rahega*," that is to say, the executant provides that after his death Mir Saiyid Ali will attend to or perform all the duties appertaining to a talukdar. I have felt considerable force in the contention on behalf of the appellants that these words and expressions considered together might reasonably be interpreted as being of a testamentary character and as implying a bequest of the talukdari estate in favour of Mir Saiyid Ali. Nevertheless upon full consideration I am not satisfied on this point. There was a previous will in existence, and if that was to be revoked and a fresh bequest made in favour of another person, I should have expected this to be done in clear and unambiguous terms. There is good reason for supposing as I shall show presently that on or about 14th November 1893, Mir Kazim Husain was meditating the execution of and probably did actually execute, (it is at any rate the plaintiff's case that he did so), another deed making over to Mir Saiyid Ali in very wide terms the management of his estate. If I were satisfied that Mir Kazim Husain in fact executed the document, Ex. 1, that he did so with full knowledge and understanding of its contents and that he caused it to be duly registered on 14th November 1893, I should still not feel satisfied that the old gentleman's intention was altogether to annul his will in favour of Mt. Taiyaba Begam and to disinherit her in favour of Mir Saiyid Ali.

I should be disposed to read the ambiguous words "*janashin o qaim muqam*" as well as the curious expression about performing the duties of a talukdar in connexion with the provisions of the

other deed which the plaintiffs allege to have been also executed on 14th November 1893, and with an expression contained in Ex. 1, itself about representing the executant in the presence of officials members of the brotherhood tenants of the estate and others, and on official occasions such as darbars held by the Lieutenant-Governor and the like. From this point of view the words "*janashin o qaim muqam*" would be treated as tautological and as meaning no more than "representative and locum tenens" and the presumed intention would be that Saiyid Ali should continue after Mir Kazim Husain's death to perform the public duties attaching to the position of a talukdar while the estate itself went to Mt. Taiyaba Begam in accordance with the will of 15th January 1887. In making these remarks I am of course adopting for the moment the plaintiffs' case with regard to the fact of execution and registration.

I fully admit the force of the arguments addressed to us that a Mahomedan talukdar could have no possible motive for executing a deed of adoption except for the purpose of effecting thereby a devolution of his estate, and that on the face of it the will in favour of Mt. Taiyaba Begam gives that lady an absolute estate and not merely an estate for life. To these contentions, however I would reply still accepting for the sake of argument the case for the plaintiffs as to the facts of execution and registration, that Mir Kazim Husain might conceivably have acted in the belief that in adopting a son to himself he was also adopting a son to Mt. Taiyaba Begam, that no disagreement was likely to take place between that lady and a young man so deeply indebted to her as was Mir Saiyid Ali, and that he really supposed that the combined effect of the will of 15th January 1887, and the adoption deed of 14th November 1893, would be that Mt. Taiyaba Begam would succeed to the estate under the will, that Mir Saiyid Ali would be her agent and representative during her lifetime and would finally succeed himself after her death. I differ therefore from the learned Subordinate Judge on this point, and hold that the effect of the deed, Ex. 1. even if it be proved to have been duly executed and registered, would not be to divest Mt. Taiyaba Begam of the estate which she took on the death of her husband under the will of 15th January 1887.

I paused to consider this point at this stage because of its bearing on the question of the pleadings and of the burden of proof which should, in my opinion, be laid on the plaintiffs in respect of their document, Ext 1. I have expressed my opinion that that document, even if fully proved, would not have the effect of setting aside the will in favour of Mt. Taiyaba Begam, but it must be remembered that it is put forward by the plaintiffs as a document which has that effect. Whatever room for argument there may be about the testamentary character or otherwise of any of the provisions of this deed, the broad fact remains that it is propounded by the plaintiffs as a document the execution of which by Mir Kazim Husain had in law the effect of nullifying the disposition of his estate made by that gentleman under his will of 15th January 1887 and of substituting Mir Saiyid Ali for Mt. Taiyaba Begam as the immediate heir to the estate on the death of Mir. Kazim Husain. The burden of proof, therefore, to be laid upon the plaintiffs should, in my opinion, be in no way less than that which the Courts have seen fit to lay upon the propounders of a will, and more particularly upon the propounders of a will which has the effect of revoking a will previously in existence.

Once any circumstances are shown to exist which may reasonably excite proper and well-grounded suspicion in the mind of the Court, a person claiming under such a document is bound to satisfy the Court, not only as to its execution, but also as to its representing in fact the mind and deed of the alleged executant. Such cases as those of *Shunmugaraya Mudaliar* v. *Manika Mudaliar* (5) and *Shama Churn Kundu* v. *Khettromoni Dasi* (6) show the kind of burden of proof which the highest Court of appeal has laid in analogous circumstances upon the propounders of wills. That there are circumstances existing in the present

(5) [1909] 32 Mad. 400=3 I. C. 799=36 I. A. 185 (P.C.)
(6) [1900] 27 Cal. 521=27 I. A. 10=4 C. W. N. 501 (P. C.)